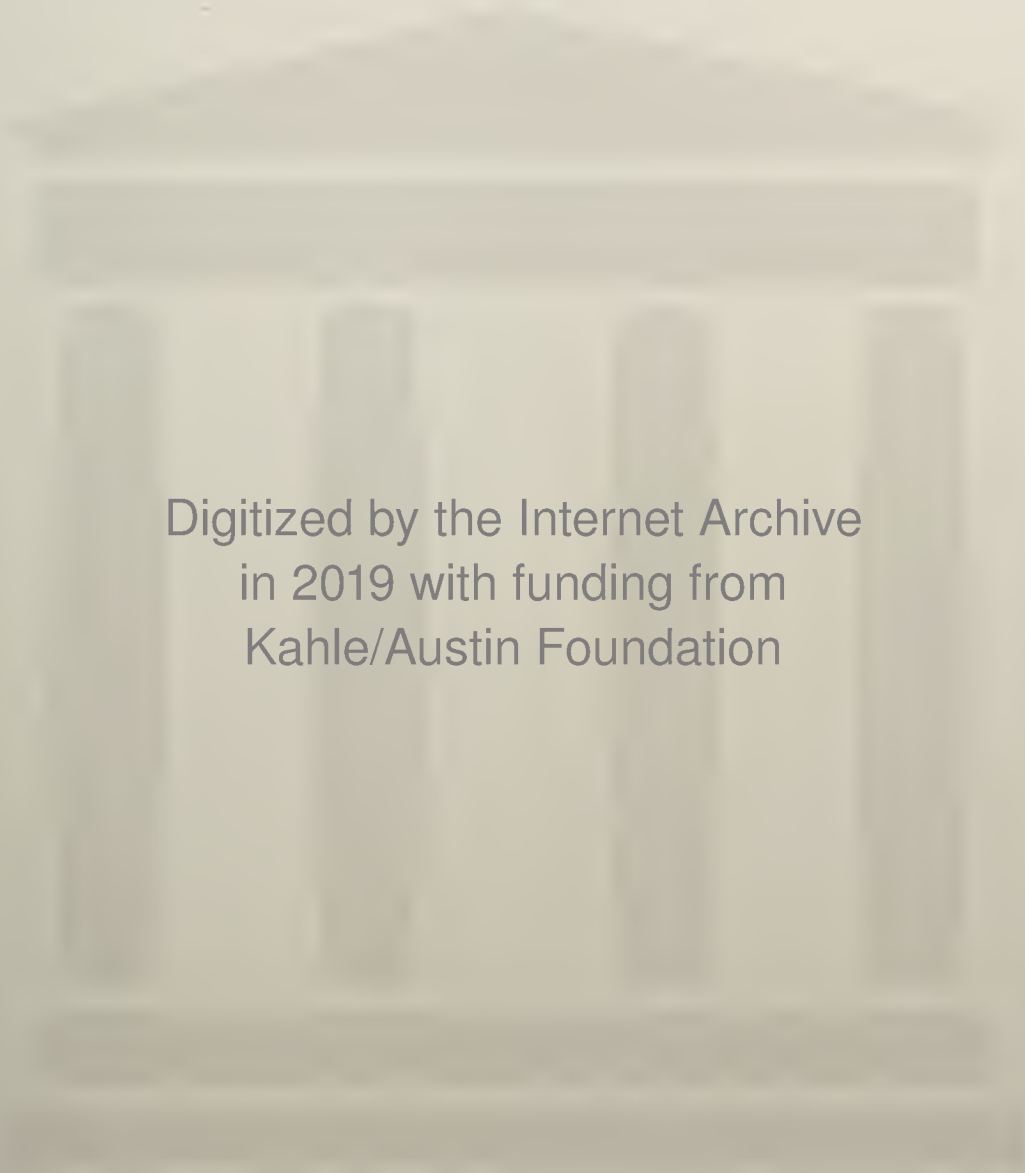


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TO ENCOURAGE THE STUDY AND ADVANCE THE KNOWLEDGE
OF THE HISTORY OF ENGLISH LAW.

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SELECT PASSAGES

FROM THE WORKS OF

BRACTON AND AZO

EDITED

FOR THE SELDEN SOCIETY

BY

FREDERIC WILLIAM MAITLAND

LONDON

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1895

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Bracton and Elzo

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INTRODUCTION.

THE purpose of this book is to enable its readers to compare the most romanesque portions of Bracton's treatise with the texts from which they are derived. It aims also at advancing, by however little, the day when a creditable edition of that treatise will have been produced.

Object of
this book

Ever since 1862, thanks to Dr. Carl Güterbock,¹ it has been generally known that Bracton, though he occasionally referred to the Institutes, the Digest and the Code, derived the greater part of his romanesque material from the works of Azo of Bologna. Therefore of Azo let us say a few words.² Early in the thirteenth century he stood at the head of the Bolognese school of law which was accomplishing that grand feat the resuscitation of the classical Roman jurisprudence. During the past century many men had laboured. Four should here be named, for we shall read of them hereafter: Irnerius, the founder of the school; Martinus Gosia, famous as one of 'the four doctors'; Placentin, the apostle of France, whom Azo will often contradict; and Azo's own master, Johannes Bassianus.³ Azo was entering into the fruit of their labours. Perhaps the most convincing testimony that remains to us of the pre-eminence that he attained in his lifetime is that given by an Englishman. In 1205 Thomas of Marlborough, after-

Azo and
his work

¹ Carl Güterbock, *Henricus de Bracton*, Berlin, 1862. Translation by Brinton Cox, *Bracton and his Relation to the Roman Law*, Philadelphia, 1866.

² See Savigny, *Geschichte des römischen Rechts*, cap. 37.

³ For Irnerius, see Savigny, cap. 27; for Martinus, cap. 28; for Placentinus, cap. 30; for Johannes Bassianus, cap. 31.

wards Abbot of Evesham, spent some six months in Bologna hearing lectures every day. He had no doubt that his teacher Azo was 'master of all the masters of the laws.' The highest praise that could be given to another lawyer was that he was second to none but Azo.¹ Savigny thinks that Azo was living as late as 1230; if so, his life overlapped Bracton's. His chief work is a Summa of the first nine books of the Code, to which he appended by way, not of introduction, but of supplement, a Summa of the Institutes.² During the rest of the middle ages these treatises remained in high repute. Nor did their glory at once pale before the lights of the new learning. Savigny mentions no less than thirty-one editions of them printed between 1482 and 1610; five had been printed before 1500. If Bracton wanted a master in Roman law, he could not have gone to one whose fame stood higher or was to be more enduring.

Bracton's
life

Of Bracton's life more is known than of Azo's; but as of late much has been written about it, little will here be said, though a few fresh facts can be offered.³ We will call him Bracton, but in a hundred contemporary records he is Henry of Bratton or of Bretton and the corruption of his name seems to be due to scribes who copied his treatise after his death.⁴ We may trace him in all probability to one of two Devonshire villages, either to Bratton Clovelly or to Bratton Fleming. In 1212 a William Raleigh was rector of the church of Bratton Fleming, while an Odo of Bratton was its vicar.⁵ This same or another William

¹ Chronicon Abbatiae de Evesham (Rolls Ser.), pp. 147, 153, 168.

² The supplementary character of the shorter Summa will be very apparent even from the passages that are printed below.

³ To what was written some years ago in the introduction to Bracton's Note Book (Cambridge, 1887) I can now add what has since appeared in Mr. Bliss's Calendar of Papal Registers (1893) and Mr. Hingeston-Randolph's edition of Bishop Broneseombe's Register (1889); also a little news gathered from the Charter Rolls at the Record Office.

⁴ The easy corruption of *tt* into *ct* is illustrated by the way in which *rettatus* becomes *rectatus* (Pollock and Maitland, Hist. Eng. Law, ii. 639). 'Braeton' has shared the fate of 'Irnerius,' whose real name seems to have been Warner or Guarner. A closely parallel case is that of the English canonist whose name appears as John de Aeton, Athon, Aton, Eaton, Anton, etc. Does anyone know his real name?

⁵ Rot. Pat. Joh. p. 93.

Raleigh rose to power and honour. We see him in 1221 acting as clerk to a court which has Martin Pateshull for its president.¹ In 1229 he was himself a justice, in 1234 the principal justice of the king's court; he was a canon of St. Paul's; he was treasurer of Exeter Cathedral; in 1239 he became Bishop of Norwich; in 1243 Bishop of Winchester; he died in 1250. There are many signs that under his patronage Bracton took to the law. The pupil has repaid his master. Bracton, when he wrote his book, had in his possession the plea rolls of Pateshull and Raleigh. Some two thousand cases or more were copied for him from those rolls into a Note Book which has descended to us. Near five hundred cases he has cited from those rolls in the course of his treatise.

He first comes before us as one of the justices in eyre who in the summer of 1245 are visiting Lincolnshire and other counties. In the autumn of that year Pope Innocent IV. confirmed to Henry de Braton, Rector of Gosebertonchurch, near Spalding, in Lincolnshire, a dispensation granted by Bishop William Raleigh for the tenure of three benefices.² He was now in the royal service and was being paid, as royal servants often were paid, by means of rectories. Early in 1248 he began to take assizes in the south-western counties, and this work he continued to perform for nearly twenty years until his death in 1268. From 1249 to 1257 or thereabouts he was also hearing pleas *coram Rege*; in other words, he was a member of what we may with some accuracy call the King's Bench Division of the High Court of Justice. Towards the end of this period we pretty often find him as one of the witnesses of royal charters; and we

Bracton's
judicial
career

¹ Gloucestershire Pleas of the Crown, ed. Maitland (1884), p. xiii.

² Calendar of Papal Registers, ed. Bliss, vol. i. p. 221: '13 Kal. Oct. Lyons. Confirmation of the dispensation given by the Bishop of Winehester to Master G. de Feringis, one of his clerks, rector of Denham in the diocese of Lineoln, to hold three benefices with cure of souls.—13 Kal. Oct. Lyons. The like to Henry de Bratona, Rector of Goseber[ton] de Scherrhe, in the diocese of Lineoln.' The clerks in the papal chancery dealt roughly with English names: *de Scherrhe* seems to represent *chireche* or *chirche*, our *church*. A note of these papal letters will also be found in vol. i. p. 230 of *Les registres d'Innocent IV.* edited by Élie Berger for the École française de Rome.

thus see him in contact with the most famous men of his time, with the future King of the Romans, with the Lusignans and Peter of Savoy, with Simon de Montfort and Richard de Clare, with John Mansell and Walter de Cantelupe, in short with all the heroes and villains of the national drama.¹ Then something happened which brought to an end his career as a judge of the supreme court. After the summer of 1257 I have not seen him in the king's train. Early in 1258 he was ordered to restore to the treasury the plea rolls of Pateshull and Raleigh that were in his possession. In 1259 he was sent out by the barons who were then in power as a commissioner for the redress of grievances along with the Earl of Hereford. In the May of that year he was instituted rector of Combe-in-Teignhead, a village near Teignmouth. Thenceforth he still takes the assizes of Devonshire and Cornwall, but seems for the rest to be settling down into the life of a country clergyman. In April 1261 he became rector of Bideford, and in that year obtained from a Walter Raleigh a life estate in a Cornish manor. At the beginning of 1264 he became archdeacon of Barnstaple, but in the May of that year he resigned the archdeaconry on being appointed to the chancellorship of Exeter.² In 1267 he was once more prominent, for he was a member of a commission of prelates, barons, and judges who heard the complaints of the disinherited partisans of Simon de Montfort. Between the December of that year and the September of 1268 he died. He was buried in the nave of Exeter cathedral, and a chantry for his soul was endowed out of the manor of Thorverton.²

Bracton's
retirement

The node of his life we seem to see in the twelve months that immediately preceded the meeting of the Mad Parliament at Oxford in June 1258. He then disappears from the high court, and, for all that we know, goes to live in his native Devonshire. Did he retire or was he dismissed? and if dismissed, whom had he offended? Some day his editor must grapple with these questions in order to solve

¹ See below, p. 236.

² For his ecclesiastical career see Bishop Bronescombe's Register, p. 36.

the problem which arises if we ask whether his sympathies were with the king or with those barons who were beginning to find a leader in the Earl of Leicester. We may be fairly sure that before he left the court he had written the main part of his treatise; but we do not know that he published it in his lifetime, or that he ever regarded it as a finished book. He seems to have added from time to time marginal notes to a manuscript that was still in his possession. To distinguish between his original text, his afterthoughts or *addiciones*, and those notes which come from other hands is not easy, for in the usual course of events the marginalia have wedged themselves into the text, and no editor has yet dislodged them.

Another curious question is raised by the initial sentences of the book. In almost all our manuscripts the author is made to introduce himself to his readers by the almost nonsensical phrase, 'I, so-and-so' (*Ego talis*). Now an anonymous law-book, or a law-book which gives the author's name only in some *Incipit* (which may or may not come from him), would be no rarity. We do not know who wrote 'Britton' or 'Fleta'; we cannot be certain that 'Glanvill' was composed by Henry II.'s justiciar. But the manuscripts of 'Bracton' will usually give his name, corrupted or uncorrupted, in a title or *Incipit*, and this makes the *Ego talis* the more absurd. Then we have at least one manuscript—the Godbolt manuscript at Gray's Inn—which gives *Ego II. de Brattone*, and there are other manuscripts which plainly seem to trace their descent from a copy in which the name was struck out or marked for omission by subjacent dots and *talis* was written above it.¹ If this was done in one of the very oldest copies, we need not be surprised at the appearance of *Ego talis* in the numerous progeny of that copy, for the mechanical fidelity of the medieval scribe was marvellous, and he was even capable, as we may see, of writing such rubbish as *Ego II. de Bractone talis* if he thought that this was what stood before him in his model.

Bracton's
mention of
himself

¹ See below, p. 5.

ancient and prolific codex is one of the mysteries that have yet to be explained.

Bracton's
Romanism

But here we are to speak only of the Roman, or, as we prefer to call it, *romanesque*, element in Bracton's work. Now we have been told by Sir Henry Maine, in words that we all remember, that Bracton 'put off on his countrymen 'as a compendium of pure English law a treatise of which 'the entire form and a third of the contents were directly 'borrowed from the *Corpus Iuris*.'¹ This is stupendous exaggeration. The amount of matter that Bracton directly borrowed from the *Corpus Iuris* is not one-third, is not a thirtieth part of his book.² The amount of matter that Bracton borrowed from Azo is larger; it may perhaps amount in all to a fifteenth of the treatise. And then as to form, shall we say that a writer who gives some seven folios to the Law of Persons, some ninety to the Law of Things, and near three hundred and fifty to the Law of Actions has directly borrowed the entire form of his book from the *Corpus Iuris*?

Arrange-
ment of the
treatise

The real form of Bracton's book, however, has been obscured by the procedure of his editor, who, following some second-rate manuscripts, has divided it in a manner in which Bracton did not divide it. The better manuscripts show that Bracton wrote a *Liber Primus*, which was intended to correspond roughly with the *Institutes of Justinian*. This comprises somewhat less than a quarter of the whole treatise in its present condition—106 folios out of 444—and contains the first and second 'books' of the vulgate text and about half of the third.³ Then to this *Liber Primus*, which he may perhaps have intended to call by some such name as *Institutes of English Law*, he added

¹ *Ancient Law*, ch. iv.

² I believe that all the passages that were taken at first-hand from the *Corpus Iuris* might be comfortably printed on ten out of the 444 folios. The first ten folios, though they look so Roman, contain hardly a sentence that has been borrowed immediately from Justinian's books.

³ The *Liber Primus* of the best MSS. ends on f. 107. The *Liber Secundus* begins with 'Cum autem de regimine sacerdotii.' How the editor of the vulgate came to begin a new book on f. 8 b I do not know. By the vulgate text I mean that of 1569, from which the text printed in the *Rolls Series* rarely departs.

other Libri dealing with various English actions—the Pleas of the Crown, the Novel Disseisin, and so forth. The book on the Writ of Right seems to be unfinished. The last three chapters of the vulgate text look like a fragment of a projected book on the Personal Actions.

It is with the Liber Primus that we shall be chiefly concerned, for this is by far the most romanesque portion of the treatise. That Liber, when regarded from our present point of view, falls somewhat easily into three sections. We have first ten folios (1–10) of the vulgate text which are derived for the more part from Azo's Summa of the Institutes. These we print below (pp. 3–133) opposite to their model, marking by the use of inverted commas the passages which are common to the Italian doctor and the English justice. In them Bracton gives what is to stand as an equivalent for the First Book of the Institutes and the first four or five titles of the Second Book. All this he does in the space of 10 out of his 444 folios. Here a sudden change takes place—a change which is externally marked in that Oxford manuscript (Digby, 222) which, so far as I am aware, is the best extant witness to Bracton's plan. The first quire or *pecia* comes to an end with a page which bears but a line and a half of writing. The next *pecia* begins with the title *de donationibus*. And here begins the second of those three sections into which the first book divides itself. In the vulgate text it fills some 88 folios (ff. 11–98 b): in other words, it is about eight times as long as the romanesque exordium. In a rough way it is intended to correspond with the last nineteen chapters of the Second Book of the Institutes and the first twelve of the Third. During the greater part of this section Bracton is giving us genuine English law. He has pushed Azo's Summa aside; he has Glanvill's treatise and the Note Book under his eye; he is no longer stumbling and blundering as he is in those first ten folios; he is writing about matters that he understands, about law that he administers. Occasionally he turns to Azo: for example, when he wants a theory of possession. Just so he has

His insti-
tutional
treatise

turned to Tancred, or some other canonist, for a theory of putative marriage.¹ Just so, at a later time, he will turn to Bernard of Pavia for a theory of homicide.² Now and then he may look at the Institutes or the Digest, but this happens rarely. Then we come to the third of our three sections, and here again in the Digby manuscript we pass from one *pecia* to another. This section is represented by nine folios (ff. 98 b-107) in the vulgate text, and is full of Romanism. Bracton is trying to finish off his institutional Liber Primus with the Law of Obligations and the generalities of the Law of Actions. The latter subject he resumes at the beginning of his Liber Secundus. Now this short piece, consisting of about nine folios at the end of the Liber Primus and three or four folios near the beginning of the Liber Secundus, is in one sense the most learned, if it is the very worst, part of the whole long treatise. For reasons which are given below,³ Bracton cannot here copy from Azo in a straightforward fashion, and he feels constrained to do the best he can by taking now a piece from this or that part of one of the two Summac and now a piece from the Institutes themselves. The manuscripts seem to show that he went back to this part of his work once or more than once. The most erudite passages that occur in the treatise, and almost the only passages in which he tries to argue about the Roman texts, are marginal afterthoughts. They may be the product of learned leisure spent in a Devonshire rectory by one who consoles himself with Code and Digest and Decretum for the loss of those beloved plea rolls. This section about Obligations and Actions is printed below, with notes designed to show the manner in which it has been compiled.⁴ Here, then, we are printing the only two lengthy portions of Bracton's treatise in which there is much continuous matter copied from Azo or from the Roman texts.

Thus the possessors of this book will, it is hoped, have

¹ See below, p. 221.

² See below, p. 225. Sir Travers Twiss (Bracton, vol. ii. p. lix) has noticed Bracton's debt to Bernard.

³ Below, pp. 135, 140.

⁴ See pp. 134-218.

before them between its two covers sufficient materials to enable them to pass a judgment on the quality of Bracton's Romanism. Before an unfavourable judgment is given it will be right for them to remember that they may not yet be reading what Bracton really wrote. The text that is here printed is taken from a manuscript which shows many signs of approaching very near in order of derivation to the original, though it is far from being a faultless guide. In it there still stands in the margin a large mass of matter which has passed into the body of other manuscripts, and, if we suppose that this, or the main bulk of this, comes from Bracton, we are thus brought close to the autograph, for, as we can see from other manuscripts, it rarely happened that a marginal note was transcribed more than once without ceasing to be marginal. Now by the use of this manuscript and a collation of some others we shall be able to remove many of the worst scandals that are to be found in the printed (or, as we are calling it, the vulgate) text. Just in the most romanesque parts of the book the editor of 1569 seems to have been singularly unfortunate, and to have often preferred the worse of two readings. He will omit a much-needed *non*, write *possibile* for *impossible*, or *pro indiviso* for *pro diviso*, if any manuscript will excuse his act. With Azo's words before us we can often decide with much certainty which version of a passage is to be preferred. There is a strong presumption that the manuscript which makes Bracton say what Azo said is better than the manuscript which makes Bracton flatly contradict his teacher. This canon generally leads to the same result as that to which we are brought by the more obvious rule that bids us hope for sense instead of nonsense. Now in many instances the vulgate text is corrigible by the manuscripts which have been examined on the present occasion. But the total number of extant manuscripts is very large, and the autograph may yet be lurking in some private library. Therefore, though some pains have been spent on looking at many manuscripts just at those places where an emendation is most wanted, still, before a final sentence is pronounced,

The quality
of Bracton's
romanesque
work

the possibility of a further purgation of a corrupted text should be called to mind.

Bracton no
instructed
Romanist.

So let Bracton have the benefit of a fair number of doubts. But, this being allowed him, let us ask whether his romanesque work is good work; whether it is the work of one who has profitably given some years to the study of Justinian's books; whether, on the other hand, it is not the work of a man to whom Roman law is new and strange. In the first excerpt from his book (ff. 1-10) that we here print (pp. 1-133) the task that he has set himself ought not to be difficult. In the main he is only trying to abbreviate a text that lies before his eyes, the text of Azo's *Summa*. Much must be omitted as inapplicable to England; some purely English matter must be inserted; but the principal task is to copy intelligently what is not to be omitted. He has not to construct a doctrine for himself out of the scattered fragments that are found in the Digest; he has only to copy intelligently from a text-book. Is this task well performed? What would Azo have said if one of his scholars had brought him this abstract? Though I have no right to be speaking of such a matter, I cannot but submit to those who have such a right that an answer favourable to Bracton's mastery of Roman law cannot be given to these questions. We cannot say that we have before us in these pages a good, an intelligent abstract of Azo's text. We can only praise them on the supposition that their writer is a beginner, and, when we compare the Azonian matter with the English matter that is occasionally inserted in its midst, we see that we have before us an able man who can write well and fluently about things that he understands. He is an able man, but he is a poor, an uninstructed Romanist. Let us make every reasonable concession to him. We must judge him by a medieval standard. He did not live in the age of Savigny; he did not live in the age of Cujas. But he did live in the age of Azo, and if we come to the opinion that the distance between him and Azo in their treatment of Roman materials is, when stated in academic terms, the difference between a

low third class and a high first, we ought to speak out honestly about this not unimportant matter. Let us by all means remember that he has a perfect right to omit whatever seems to him unsuited to England. He has a perfect right to contradict Azo or Tribonian whenever Azo's doctrine or Tribonian's runs counter to English practice. Let us go further, and forbear to blame him for giving utterly new senses to technical Roman terms, as when he bestows the name *statuliber* upon the runaway serf who is enjoying a *de facto* liberty. There remain, however, many cases in which to all appearance he wishes to say in brief what 'the master of the masters of the laws' has said at length, but fails to see Azo's point, and instead of pointed argument gives us pointless truism or something that is dangerously near nonsense.¹

The part of his book that is devoted to the Law of Obligations and the generalities of the Law of Actions² is no better. Here his task was harder, for he could not simply copy from Azo; he had to go to the Institutes themselves. He desired to find there the general principles of a law of contract; he desired also to fit our English actions into the Roman niches. Now, granted that this work was to be done at all, we shall perhaps allow that it is not altogether badly done. In particular some omissions are sagaciously made. But at the same time, if we say that these pages are good, we must be reserving some far higher praise for other parts of the treatise. If we compare them, for example, with the Book on the Novel Disseisin, and call the latter only good, no word but 'bad' will fit the former. In the one case we see a beginner who is tentatively groping his way among uncouth terms and alien ideas; in the other case we see a master at his ease.

Bracton on
Actions and
Obligations

¹ See, for example, the charges that are reluctantly made against Bracton on pp. 33, 41, 49, 51, 63, 71, 75, 91, 93, 95, 97, 103, 109, 119, 121, 123, and then read by way of contrast (p. 81) the classical passage about the ancient *demesne*. Perhaps I may be allowed to say that the opinion here expressed is one which has been slowly borne in upon me in the course of my work, and that at starting I believed Bracton to be an instructed legist.

² Below, pp. 134-218.

Use of
Roman law
as sub-
sidiary law

The romanesque work is the worst work that Bracton has left behind him. Naturally this is so, for he only falls to copying from Azo or the Institutes when he writes about matters which rarely, if ever, come before the English courts and cry aloud for decision. When the plea rolls fail him, then, and not till then, he looks to the Italian legist for transcribable doctrine. The English courts have as yet no law of contract; they hardly feel the want of one. The English courts have no law about 'accession' and 'confusion,' and 'specification.' May we not, after six centuries, say that they will never feel the want of one? Where, in all our countless volumes of reports, shall we find any decisions about some questions that Azo has suggested to Bracton? For one reason and another our courts have not been troubled with the 'natural' modes of acquiring ownership. At this day an English text-writer who wished to make his treatise on the law of property exhaust all possibilities, frivolous as well as reasonable, would be tempted to do what Bracton did—to look for help in the books of foreign civilians, and make the best he could out of *ferruminatio* and *adplumbatura*.¹ Naturally, therefore, the pages which Bracton tries to fill with Roman law are his worst pages. They are not, as most of his pages are, a record of experience.

Unimportance of the
romanesque
work

Those who have spent a few minutes or a few hours in glancing at his treatise (and in modern times it is seldom read through) are likely to form an untrue notion touching, not only the amount, but also the importance of the romanesque matter that it contains. In the first place they look at the first few pages: they see the *tria praecepta*, the island arising in mid-stream, the purple patch, the

¹ Observe, for example, Blackstone's procedure, Comment. ii. 404. He says a little about the Roman rules of accession, and adds:—'These doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts.' In support, he cites Bro. Abr. tit. *Propertie*, 23 (= Y. B. 5 Hen. VII. f. 15, Hil. pl. 6); Moore, 20; Poph. 38. The authorities thus referred to are far from covering the whole field. In particular there seems to be a complete silence as to the possibility that the owner of what Azo would have called the *totale corpus* may be bound to make compensation in respect of a member that has been added to it.

painted panel, and Titius planting his cabbages in the soil of Maevius. Then, passing by a lot of dull old stuff about prerogative wardship and so forth, they fasten on the generalities of the law of contract and see some apparently learned talk about *stipulatio*, *acceptilatio*, *novatio*, and what not. Here at last is something interesting, something practical, for what can be more vital in a system of law than its general theory of contract? In truth, however, they have fastened on the least important part of the book. So far were the courts of Bracton's day from a general theory of contract, that what anyone might choose to write about this matter could do little good and little harm. If we desire to know what pages of his treatise were the most important at the time when they were written, we can apply a simple test. When Bracton deals with matters which come before the English courts, he cites English cases. When he has no English cases to cite, then he looks abroad; but when there is this 'dearth of authority' then he is dealing with questions that for the men of his own time are practically unimportant: he is dealing with speculative, with academic questions.

When we have dissected his work, we shall (so I think) find ourselves doubting whether he had ever been taught much or any Roman law. Such evidence as we have points to the conclusion that he had not taken a doctor's or master's degree, for while the chancery habitually gave the title *Magister* to some of his fellow justices of assize, that title is as habitually denied to him.¹ Further, we may doubt whether the quality of his Romanism would have reflected credit on a graduate in law of a learned university of the thirteenth century.² A guess, however, may be made which will perhaps start a profitable inquiry. We are told that the Abbot of Evesham whom we have mentioned,

Bracton's
education

¹ See, for example, the printed Excerpta from the Fine Rolls, where the title is regularly given to Simon de Wautone and denied to Henricus de Brattone. In Selden's copy of Thornton's epitome (see Fleta, p. 459), Bracton seems to have appeared as Magister Henricus de Bryetona; but this comes from a time after his death when his very name was being forgotten.

² The story that connects him with Oxford has not been traced beyond Balcan. See Diet. Nat. Biog. under *Bracton*.

Thomas of Marlborough, had, in days before he took the cowl, taught civil and canon law at Oxford and at Exeter.¹ We have seen how at a later time he listened to Azo's lectures. In the chronicle that he has left us he shows himself a keen lawyer, and in telling a story he quotes the following verses :

quicquid plantatur, seritur vel inaedificatur,
omne solo cedit, radices si tamen egit.

We find these verses in the margin of some of the manuscripts of Bracton's book.² In that book we find another couplet of the same quality :

re, verbis, scripto, consensu, traditione,
iunctura vestes sumere pacta solent.³

The Exeter
School

Now it does not seem an extravagant supposition that a Devonshire boy was sent to school at Exeter, to the school in which Thomas of Marlborough had taught, the school of that cathedral in which Bracton's body was to lie. And by the way we may remark that a passage in his treatise, which has before now been relied on to prove his connexion with Oxford may only show (what needs no proof) a connexion with Exeter. In the vulgate we read 'ut si 'dicas, existens Oxoniae, *Hodie Londoniae dare spondes, 'talis stipulatio erit inutilis.*' But good manuscripts, changing one letter, speak of Exeter, not of Oxford.⁴ Whether or no in Bracton's day the feat of walking or riding from Oxford to London in the space of twenty-four hours would have been regarded, not merely as impossible, but as a good typical impossibility, I dare not say ; but the distance between Exeter and London might well be compared with that between Carthage and Rome ; also a substitution by transcribers of a more famous for a less famous name is more likely than the reverse process. On this mention, if such it be, of Exeter we must lay no stress. Still we have some slight evidence of Roman law being taught

¹ Chron. Abb. de Evesham, p. 267. Mr. Macray, the learned editor of the Chronicle (p. xxi), would get rid of Exeter, but only, if I do not misunderstand him, on the ground of *a priori* improbability.

² See below, p. 121.

³ See below, p. 143.

⁴ See below, p. 149.

there, just as we have some slight evidence of its being taught at London, perhaps in the school of that cathedral of which Martin Pateshull was the dean and William Raleigh was a canon.¹ A little teaching in a school where boys learnt their *Quicquid plantatur* and their *Re, verbis, scripto* may well have been all the teaching of Roman law to which Bracton had ever listened, for I cannot help thinking that in the main his romanesque work looks like the work of a self-taught man, who, when no longer very young, has gallantly endeavoured to grapple with Azo's *Summa*, and who in so doing has taken up an 'advanced' book, wherein are many subtleties and technicalities, for which he has not been prepared by a thorough education in first principles.²

Therefore in publishing by themselves the two pieces of Bracton's work that are comprised in the present volume, we are, at least in one man's opinion, doing Bracton an apparent injustice. It is as though we published apart from their context Coke's etymological or Blackstone's philosophical speculations. But the question as to the quality of Bracton's Romanism seemed to be one that should be pointedly raised, and if the answer here given be wrong, it can be contradicted. In truth, however, if we are compelled to hold that he often misunderstood Azo, we shall still leave all his fair fame undiminished. We may safely say that had Azo endeavoured to make a brief abstract of Bracton's best pages, he would have been guilty of many a wonderful mistake. If *praescriptis verbis agere* was Greek to Bracton, a *placitum de retito namii* would have been Hebrew to Azo. Nor is it for one moment suggested that Bracton and his predecessor Glanvill

Roman
matter and
Italian form

¹ As to the well known writ of 1234 prohibiting the teaching of the *Leges* in London, see Pollock and Maitland, *Hist. Eng. Law*, i. 102.

² At any rate on the continent of Europe and at a somewhat later time the teaching of Canon (and therefore of Roman) Law in mere cathedral schools, which did not aspire to be *studia generalia*, seems to be well attested. See J. F. von Schulte, *Gesch. d. canonischen Rechts*, ii. 464. Until we have learnt how a university formed itself at so unlikely a place as Cambridge, we are not in a position to deny that in various other places there were germs of universities which came to nothing.

derived no benefit from the books of the legists and canonists. On the contrary, the benefit that they derived was inestimably great. They learnt how to write about, how to think about, law, and besides this they acquired some fertile ideas, distinctions and maxims, which they made their own and our own. In a very true sense Bracton is most Roman, not when he is copying from the Institutes or from Azo's Summa, but when he is studying his Note Book, when he is weaving a doctrine out of the plea rolls, when he is dealing with the judgments of Pateshull and Raleigh as Azo had dealt with the opinions of Ulpian and Paulus, or the glosses of Martin and Placentin. It is then that we see what the revived jurisprudence of Rome has done for English law. But in order that we may intelligently admire Bracton's best work, we must know his worst work also. When he uses an Italian book as a model, he does well; when he uses it as a 'crib' he does ill.¹

Bracton's
library

He had a good many books at his command. He had the *Leges Edwardi*.² Possibly he had some interpolated version of the Anglo-Saxon laws that has not come down to us.³ He had Glanvill's treatise.⁴ He had his own Note Book and must have had a Register of Writs. Then he had the *Decretum* and some collection (perhaps the

¹ It is very noticeable that the one title of the Digest which Bracton pillages freely and with his own hand is a title which our modern English civilians are apt to treat as comparatively uninteresting, namely the title *de poenis* (48. 19), and that the longest piece that he takes from the Digest is a piece ascribed to Claudius Saturninus (48. 19. 16) which in a scholastic form gives some vaguely sound advice to the judge who has to allot a punishment. (See below, pp. 189-191.) That is the sort of passage which came home to Bracton as useful and enlightened.

² Bracton, f. 134 § 3 is from *Leg. Edw. Conf.* 16. Bracton, f. 124 b, seems to use *Leg. Edw. Conf.* 23 (21) but also seems to go back to the *Quadripartitus* version of Cnut, ii. 20.

³ See the apparent citation of some laws of Æthelstan on f. 147. This passage deserves to be explored in the MSS.

⁴ Dr. Güterbock, p. 23, seems to underrate the use made by Bracton of Glanvill. This use is apparent throughout the chapters devoted to inheritance, wardship, relief and the like, but is partially concealed by the fact that Bracton expands his predecessor's brief text. For instance, compare Bracton, f. 87 b § 6, with Glanvill vii. 11. Bracton has worked into what he writes almost every word of Glanvill's parallel passage.

Gregorian collection) of Decretals;¹ also it would seem that he had Tancred's *Summa de Matrimonio*² and Bernard of Pavia's *Summa Decretalium*.³ If we were reckoning up all his books, we should have to include a well-read Bible, some volumes of sermons, an Ovid⁴ and perhaps a chronicle wherein might be seen some legendary exploits of Robert King of the French.⁵ But, to turn to matters more germane to our purpose, he had the Institutes; he had the Code (or at least the first nine books, which constituted a complete *Codex* in medieval eyes), and, if he had not all the three sections of the Digest, he had the *Digestum Vetus* and the *Digestum Novum*.⁶ On some five-and-twenty occasions he expressly cites these Roman books. Then he had Azo's two *Summae* and he may have had some more elementary text-book. His possession of these books need not surprise us. There are to this day in English libraries books of Roman and Canon law which seem to have been in England ever since the thirteenth century. Thus Caius College possesses a manuscript of Azo which to all appearance was in Cambridge or its neighbourhood some six hundred years ago. The same college has also a copy of the *Infortiatum* (that is, the middle section of the Digest) that was pledged by one Englishman to another in the year 1248, that lay as a pawn in 'the common chest' in the year 1285, and was sold to a Master William of Louth in whom we may see a keeper of Edward I.'s wardrobe and a bishop of Ely.⁷ In 1313 there were in the king's exchequer

¹ Güterbock, p. 38. On f. 183 b of the vulgate, Bracton is made to allege V. Q. V. C. I. It seems to me that the citation should be Causa 6, Quaestio 5. c. 1. The rubric is 'Onus probationis reo non incumbit,' and this will suit the context.

² Below, App. I.

³ Below, App. II.

⁴ Below, p. 165: 'Poena potest demi, culpa perennis erit;' p. 166: 'Quod tamen admissum, quae sit vindicta, docebo.' The first of these lines comes from Ovid. *Epp. ex Ponto*, i. 1. 64; the other from Ovid. *Metam.* i. 210. I have to thank Mr. Robinson Ellis for sending me to the right quarter.

⁵ Bracton, f. 147, a long (marginal) story about a rape with romantic consequences. M. Charles Bémont has kindly informed me that the origin of this queer tale is unknown to him and to some other eminent French scholars; but that the mention of money of Beauvais points to a source that must have been a century old in Bracton's day.

⁶ Güterbock, p. 27.

⁷ Mommsen, two-volume edition of the Digest, vol. i. p. xxxix. Too many of the interesting memoranda upon the fly-sheets of the book are

three books of the Institutes with the Parvum Volumen, four copies of the Digestum Vetus, two of the Digestum Novum, a *Forsad* (that is an *Infortiatum*), three copies of the Code, the Authenticum, various *Lecturae* upon the Code and Digest, three books of Decretals, four *Summae* of the Decretals, Tancred's *Summa* and a book called *Actor et Reus*, besides other law books.¹ So handsome a collection can hardly have been made in a few years, and it is by no means impossible that some of these royal manuscripts had been turned by Bracton's hands when he was a justice of Henry III.'s court. It was into a world in which such books as these were not unknown that he sent his treatise.

The hopeless
enigma

Is it needful, then, to defend him against the charge of intending to deceive? That charge has been made by one whose judgments we cannot ignore, even when we think them wrong. It is thus that Sir Henry Maine wrote of Bracton:—'That an English writer of the time of Henry III. 'should have been able to put off on his countrymen as a 'compendium of pure English law a treatise of which the 'entire form and a third of the contents were directly 'borrowed from the *Corpus Iuris*, and that he should have 'ventured on this experiment in a country where the 'systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas 'in the history of jurisprudence.'² Is there really here any hopeless enigma?

The charge
of plagiar-
ism

If so, let us not spoil the riddle. Had the systematic study of Roman law been formally proscribed in England, Bracton might perhaps have hoped that his project of

but partially legible. The names of William de Louth, Roger Huthreye, Simon of Northampton, Richard de Alsinge, Thomas de Hoo (or, according to Mommsen, Vo) appear. In chalk there seems to be a draft of a letter to Hamo de Hautain. One real or hypothetical case concerns two rectors in the diocese of Norwich, another a clerk collated by a bishop of Ely. A third begins '*Supposita consuetudine quod episcopus Menevensis bona parochia-* ' *norum suorum ab intestato descendendum habere debeat.*'

¹ Calendar of Close Rolls, Edw. II. 1313-1318 (printed), p. 10. In the calendar we read 'three books of the Institutes with a little volume.' No doubt this little volume is the so-called *Parvum Volumen*, which contained as a general rule the Institutes, the last three books (*Tres Libri*) of the Code, the Authenticum and sometimes the *Decima Collatio*. See Savigny, *Gesch. d. r. R.* § 192.

² *Ancient Law*, ch. iv.

‘putting off’ one thing for another would be successful. But unless we give credence to a papal bull that seems no better than a forgery or a joke, or unless we hold that what may not be taught in a school in London may not be taught anywhere within the realm, we have no evidence that the systematic study of Roman law was proscribed formally or otherwise in the England of Bracton’s time. And, on the other hand, we have plenty of evidence of the existence in this country of many men who were professional legists,¹ and to whom we must attribute at all events some slight power of recognising a fragment of the Institutes when they saw it. Take for instance William of Kilkenny, keeper of the great seal, who founded exhibitions in the University of Cambridge and sent many a writ to Henry of Bratton; he was, says Matthew Paris, *in iure canonico et civili peritus*.² Was this learned person likely to believe that the *tria praecepta iuris* were first proclaimed by an English justice of assize? Would not speculations about purple patches and painted panels, about islands that arise in mid-stream, seem to him strangely familiar? Then, again, there must have been men who had listened at Oxford to the lectures of William of Drogheda; and they, as his extant *Summa Aurea* shows us, must, if they had not forgotten all that he taught them, have been ready to punctuate many of Bracton’s sentences with an *ut inst.*³ And if Bracton was rash in hoping that he could impose upon legists such as William of Kilkenny, he must have been even rasher in hoping that he could impose upon his fellow justices—upon Thurkelby or Preston. We need not hesitate before saying that the talk in his book about usufruct (to say nothing of acceptilation) gave the English lawyers of his day just the same little shock that a modern English lawyer would feel if he met with usufruct (to say nothing of acceptilation) in a text-book or a judgment. These are not words that are found upon the plea-rolls. Bracton has two languages :

¹ Pollock and Maitland, *Hist. Eng. Law*, i. 193, note 3.

² *Matt. Par. Chron. Maj.* v. 130.

³ Drogheda, whose *Summa* exists in two MSS. at Caius College, seems to have died in 1245.

the language of English law and the language of 'general jurisprudence.' We can even now see when he passes from one to the other, but the transition must have been yet more easily visible to the justices of his own day. Of a truth, then, he was a bold man and 'ventured' far.

The charge
repelled

The limit of his courage we have not yet seen. While engaged in his work of 'putting off,' he expressly and audaciously refers his readers to the *Summa* and the *Institutes*,¹ knowing, of course, that they will not be at pains to look at these books and see how much has been 'put off' upon them. Such hardihood is sublime. But when we have once stated our enigma in all its hopelessness, we cannot hope to make even an enigma of it. There has been no 'putting off.' There has been no 'venturing'—at all events, on Bracton's part. No doubt, according to the ideas of our own age, he has treated Azo shabbily. He has treated Glanvill in the same way. He, in his turn, will be similarly treated by the writers of those books that we call 'Fleta' and 'Britton.' But he did no wrong. A literary communism prevailed. There was no property in ideas or in sayings. Otherwise it might be at Bologna, where already there was strenuous competition for students and their fees. Here in England there was no such struggle, and therefore there was no legal or moral copyright in a law-book. The case of the historians is the same. They never think of telling us the names of those whose annals they appropriate, and yet we do not accuse Florence and Hoveden, Wendover and Paris, of 'putting off' or 'venturing.'

Roman law
as supple-
mentary law

But, it may be said, the gist of the indictment or the enigma is, not that Bracton has stolen another man's work, but that he has represented Roman law to be English law. If so, let us in the first place abandon all talk about 'putting off' and 'venturing,' and in the second place admit that Bracton is only doing what plenty of other people have done, are doing, and will do in many parts of

¹ Below, p. 113: 'Secundum quod in Institutis legitur . . . ut in Institutis plenius inveniri potest et in Summa.'

Europe. For example, he is doing what almost at the same moment Pierre de Fontaines is doing in the Vermandois. He is assuming that Roman law may be and ought to be used as subsidiary or suppletory law to fill the gaps in national or provincial custom.¹

How it came about that this assumption prevailed is a very large question. Something has been said in this context of the theoretical continuity of the Empire; but we may gravely doubt whether this had much influence on the Englishmen or the Frenchmen of Bracton's day. We make a great mistake if we suppose that all men or all theorists saw the temporal order culminating in the Emperor in the same manner as that in which the spiritual order indubitably culminated in the Pope. This, for example, was not the opinion of strong papalists, who pictured the successor of St. Peter entrusting one of the two swords to various kings and princes, each of whom would use it in his own dominions.² The transaction between Richard I. and his imperial gaoler was in the eyes of Englishmen 'void for duress,' while there was more solid ground for the doctrine that England was a papal fief, and that King Henry had been in ward to Pope Honorius. Both papal fief and imperial fief it could hardly be, more particularly when the Holy Father was preaching a crusade against a deposed and excommunicate Caesar. But, in truth, though England could afford to be neither Guelf nor Ghibelline, Bracton is careful to put 'emperors, kings, and princes' upon one and the same level.³ He was looking forward to a time when a so-called King of the Romans (whom Englishmen would persistently call King of Almain) would be when in England a subject, a tenant, a vassal of the King

Imperial
theories

¹ Even if Bracton had ascribed Roman texts to English legislators, he would not have stood alone. M. Esmein (*Cours élémentaire d'histoire du droit français*, ed. 2, p. 730) tells how the author of the French law book known as *Jostice et Plet* puts rescripts of Hadrian into the mouth of St. Louis, and attributes Ulpian's opinions to Jehan de Beaumont.

² See for the doctrine of the canonist Alanus, who probably was of English birth, Schulte, *Gesch. d. canonischen Rechts*, i. 96.

³ See below, p. 63. Also Bracton, f. 171: 'princeps vel rex vel alius qui 'superiorem non habuerit nisi deum.'

of England.¹ It is to the Mirror that we must look for imperialism, and the Mirror is exception enough to prove any rule.²

Attraction
of Roman
law.

Much, on the other hand, should be said of the intrinsic attractiveness of Roman law, its reasonableness, its lucidity, the high stage of civilisation that it represents. The very difficulty of unearthing a buried system and of piecing together the fragments of a classical age that are disjected in the Digest gave to the study of the old jurisprudence all the fascination of an intellectual puzzle. Again, for us who, when we write about law, do not write in a dull and humdrum Latin; for us who are taught to regard the Latin of the Digest as at best the product of a silver age, that book has lost one of the charms that it had for a lawyer of the thirteenth century. He saw in it a model for pointed legal diction. What he wanted to say was said there with a neatness that he would strive to imitate, though he could never hope to attain. Besides, a large portion of the Roman system, and the portion that would be most useful as suppletory law, bore on its very face (at least so men thought) a claim to be the law of no one nation but of all nations, of all men, a Law of Nature, and therefore in the eyes of Christians a Law of God.³ Nor were the Italian legists bashful. Azo paints the professor of the civil law judging the tribes and the nations.⁴ Bracton had been persuaded that everywhere outside England men were ruled by that law.⁵ Had he crossed to the Normandy of which

¹ Bracton, f. 47. The King of Almain is sued in an English court, Placit Abbrev. p. 145.

² Mirror, Seld. Soc., p. xxxiv. Dr. Grueber, in his Introduction to Mr. Ledlie's translation of Sohm's Institutes (Oxford, 1892), p. xxx, ascribes a weightier influence to the imperial theory than I can ascribe. The French lawyers of a later time were at pains to explain that the prevalence of Roman law in the *pays de droit écrit* implied no subjection to the Empire. See Esmein, Cours élémentaire d'histoire du droit français, ed. 2, p. 716.

³ Below, p. 32: '*ius naturale est quod natura, id est, ipse deus docuit omnia animalia.*' It is not impossible that, if we would catch the sense that the term *ius gentium* would convey to a medieval Englishman, we ought to recall the fact that in his Latin the word *gentes*, like the modern French *gens*, will often stand, not for *nations* or *peoples*, but for *people*, so that *gentes laicæ* will be *lay folk*, and *ius gentium* will be the law to which all human beings are subject merely because they are human beings.

⁴ Below, p. 2.

⁵ Below, p. 3.

his king still called himself the duke, he would have been undeceived. Had he gone as far south as Bordeaux, he would have found that Roman law still ranked below 'natural reason' and far below the customs of the city.¹ After all, the idea that, when English 'authority' fails, we may look abroad for suggestions is not very strange to us in our own day. The respect that French and English lawyers of the thirteenth century were ready to pay to the *leges* was a phenomenon of the same kind as the respect that, even in these days of rigorous 'case-law,' an English court will on occasion pay to an American decision or an American court to an English decision. If we can think of 'the common law' as common to England and to American republics, our forefathers could think of a law that was common to all mankind; and a law which expressly claimed to be this law, or seemed to lie, in the Roman books. When we consider its real merits and also its magnificent pretensions, when we consider what was beginning to happen in France, what was going to happen in Germany, the cause for our wonder will be, not that Bracton when writing that large book of his borrowed so much from the legists, but that he borrowed so little and could already find in his *Note Book* and the plea rolls a solid core of established doctrine and practice which 'derogated' at countless points from the law of nature and of nations. Pierre de Fontaines in the Vermandois could romanise without the restraint of a *Registrum Brevium*.²

That Bracton's book met a want and won a splendid success there can be no doubt whatever. It was a large

Bracton's
success

¹ Viollet, *Histoire du droit civil français*, p. 150. But some manuscripts put the Roman law just above natural reason.

² See what has been said by M. Brutails, *Études sur la condition des populations rurales du Roussillon* (Paris, 1891), p. xxix: 'Le droit romain représentait dans nos pays le droit par excellence, *jura*, la plus haute expression de la justice; mais dans la pratique il ne fut jamais qu'un droit supplétoire: tout au plus fut-il invoqué pour les cas que la coutume ne réglait point, parce qu'ils étaient assez rares ou d'assez peu d'importance pour qu'elle n'eût pas à en tenir compte.' It seems to me that these last words admirably describe the matters which Bracton would regulate by texts borrowed from the Roman books. Cases of 'confusion' and 'accession' were sufficiently rare; a general doctrine of actions and obligations was of sufficiently small importance. In the suit for the crown of Scotland (1292)

book, copies of it must have been costly, and yet to this day some forty copies of it, mostly written in the first half of the fourteenth century, attest its utility and its fame. Some of them show in their margins signs of diligent study, allusions to new statutes and recent decisions, cavils and speculations. Then of 'Britton' we have at least some twenty copies, and 'Britton' we might well call a Student's Bracton, an abridged practical Bracton 'brought up to date.' Copies of these books seem to be nearly as common as copies of the Edwardian statutes; they are almost infinitely commoner than copies of the earliest Year Books. We may, I believe, doubt whether any book written by a medieval Englishman that was as bulky as Bracton's and was not a book of devotion or of theology was more popular or more often transcribed. The extant copies of it, all written in one country and one brief age, would make a not discreditable show even if set beside the extant manuscripts of the Digest.¹ That just about two centuries after Bracton's death the judges said that he never was deemed an authority in our law proves very little.² Many things had happened in those two centuries; a new idea of 'authority' had been evolved, and it would have been strange if in the year 1457 this old text-book had not become antiquated, for it was not, like Azo's Summa, an attempt to restore a classical immutable past; it was an attempt to state what Bracton knew to be a rapidly growing system. The manuscripts seem to tell us that for a cen-

the notion that even in such an unprecedented case, an appeal might be made to the *ius scriptum* (Roman law) was repudiated, not only by English barons and prelates but also by English canonists and by a papal nuncio. See Rishanger (Rolls Ser.), pp. 254-6. 'Dominus Rex,' said the titular Bishop of Byblos, 'hic censetur Imperator.'

¹ Mommsen, Preface to the two-volume edition of the Digest, p. xxxv, says that if in medieval fashion we reckon the Digest to consist of three different volumes, there may be five hundred MS. volumes extant. Of the Digestum Vetus he could reckon up some two hundred copies.

² Fitz. Abr. tit. *Garde*, pl. 71: 'Bracton ne fuit unques tenus pur auctor 'en nostre ley.' This case is reported in Y. B. 35 Hen. VI. f. 52 (Hil. pl. 17) where this remark does not occur. It is plain from Fitzherbert's words that he had two reports before him. Lord Redesdale (*Shannon v. Shannon*, 1 Sch. & Lef. 327) made a very similar remark about Blackstone.

tury or thereabouts our English lawyers were steeped in Bracton.¹

Two last words about the book that is now to be published have yet to be said. In the first place, a protestation of humility and diffidence on the part of the editor would not meet the facts if it were couched 'in common form.' He (whatever may have been Bracton's case) is no instructed Romanist, but has acquired the very little, the almost nothing, that he knows of Roman law painfully, late in life, and in order that he might understand some sides of English history; and, though learned colleagues of his, Mr. Henry Bond of Trinity Hall and Mr. Buckland of Caius College, have kept him out of some blunders, it is but too likely that he has been guilty of others. No doubt the task would have been much better performed by one who knew his Digest; but at present and in this country students of Roman law are much more interested in its classical than in its medieval form, and have little care for Azo or Bracton or the plea rolls. I dare only hope that my work is not scandalously bad. In the second place, it will be known to the recipients of this book that the cost of it has been borne by a generous donor, and that thereby the resources of the Society have been husbanded. Were I at liberty to name him, I should not like to dedicate to him so poor a piece of work. As it is, the dedication, if any, must be to the abstract but good and lawful man of Roman or of English law. The homage that I may not offer to Titius (for I do not know him) I place in the hands of J. S.

Last words

F. W. M.

¹ In this paragraph I have had in view some words written by Sir William Markby in his *Elements of Law*, ed. 4, p. 55: 'I am not aware upon what authority the statement of Bracton's influence on English law rests.' With all deference I must submit that the existence of even one such MS. as Camb. Univ. Lib. Dd. vii. 6, in which the text was elaborately glossed about the year 1307 would be strong evidence, and that the existence of some forty copies in our own day after all the ravages of time is susceptible of only one explanation. I do not say that the book was cited in court: for a long time the Year Books were very rarely cited; but that it was read by countless lawyers and law-students I cannot doubt.

19th June, 1895.

THE TEXT OF AZO.

Of Azo's Summa there does not seem to be any modern edition. The work of critically editing it could not be performed in this country, for MSS. and even printed copies of it are rare. Until lately the University Library at Cambridge had no copy at all, and but three of the many editions mentioned by Savigny are represented at the British Museum. I could hope to do no more than to give of the portion that was to be here printed a roughly correct version, and may have failed to do even that, for I have seen enough to say that some of the printed and manuscript copies are by no means faultless.

Our text is taken from a copy of the *editio princeps* (Spirae, 1482) now belonging to the Cambridge University Library. Some variants have been taken from copies of two other of the oldest editions (Papiae, 1484, and Venetiis, 1498) which are in the British Museum; also from two MSS. at the British Museum, namely, Royal 9. C. 6 (hereafter referred to as *Y*) and Arundel 492 (hereafter referred to as *Z*). By the kind permission of the Master and Fellows of Gonville and Caius College at Cambridge a more thorough use has been made of two MSS. belonging to their library. One of these, now numbered 487 and formerly numbered 491, is referred to as *Gonv.* It contains, among other things, an imperfect copy of the Summa of the Institutes and the Summa of the Code; between which occurs *Materia ad pandectam secundum Jo*; as to this see Savigny, *Gesch. d. r. R.* vol. v. § 21. At the beginning of the section of the volume which contains these things we may see *Summa Azonis super libello institutionum, et codicis, ff., precii xx solid.* The other of these MSS., now numbered 139 and formerly 33, will be referred to as *Cai.* It is described by Gustav Hänel in his edition of the *Dissensiones Dominorum* (Lipsiae, 1834). The copy of the Summa of the Institutes that it contains, though probably written in Italy, seems to have been in England and the neighbourhood of

Cambridge ever since the thirteenth century; this may be gathered from precedents scribbled upon blank pages. Both *Gonv.* and *Cai.* have been of great service in suggesting better readings than those found in the Speier edition; but *Gonv.* will with uncommon frequency omit a passage which begins and ends with the same word. I have only used these MSS. so as to correct decided errors in the Speier text. Small variations in the order of words and in the tenses and moods employed in the statement of hypothetical cases are exceedingly numerous, and I have taken no notice of them.

A little use has also been made of an edition of 1563 (Basileae) which was produced by 'Henricus Draesius.' In some respects this is, no doubt, a much better edition than those that preceded it; but I fear that it is in a certain sense too good, for the learned editor, who describes his own procedure in a lengthy preface, evidently allowed himself a large liberty of rejecting what he called barbarisms (he talks of Augean stables and so forth) and of improving the Latin that he found in the old books. There is too much of the humanist about him to allow of our taking him as our guide. And here it may be remarked that the best Bracton MSS. might be of service to anyone who was engaged in restoring Azo's text, since they bear witness to what Bracton read in an ancient MS. of the Summa.

Two illustrations may be given of the way in which that text has been treated. When Azo (below, p. 6) says 'et tam militaris res est in tuto collocata quam ipsae leges armorum podio [*al. praesidio*] servatae sunt,' we might naturally prefer the *praesidio* of the Basel edition to the *podio* which we find elsewhere; and, turning to Bracton we might naturally prefer the *praesidio* of the vulgate to the *podio* of the MSS. Nevertheless the evidence that we have seems to tell us that both Azo and Bracton wrote *podio*, and in the middle ages the word *podium* was commonly used to mean *support*. Then Azo (p. 56) accuses certain people of believing that a *libertinus* is the son of a *libertus*. These people he in some editions calls *grammatici*; but there can be little doubt that the *garamantes* of some MSS. and of the Speier edition is a truer, if at first sight a much less intelligible, reading. Here I have to thank Count Ugo Balzani for informing me, through Sir Frederick Pollock, that the name of this African people is found in early Italian literature as a word of depreciation or abuse. I have dared to compare it (p. 63) to our *niggers*. Whether Azo meant this word to convey

any more specific charge than that of barbarism or stupidity, I do not know ; but I think that he used it. His tongue had a rough side. Now it is the extrusion of such words as *podio* and *garamantes* which makes me unwilling to accept the expurgated text given by Draesius. An edition published at Venice in 1566, which Savigny describes as a mere reprint of the Basel edition of 1563, I have also seen.

When Azo cites Justinian's books I have added within brackets a modern equivalent for his citation, using what seemed to me the simplest of all notations. In some instances I have set out within brackets and within an indentation the passage to which Azo refers. For this purpose Mommsen's and Krüger's edition of the *Corpus Iuris* was used ; but the 'Authentic' were taken from an old edition. These passages have been printed in order that some specimens of Azo's method might be easily examined by readers who are not familiar with the doings of the legists. Such readers will, I think, be impressed by Azo's power of bringing together texts from parts of the *Corpus Iuris* which lie remote from that which he is expounding. In choosing the passages which should be thus treated, I have not been guided by any systematic plan ; but I rejected long passages, and those of which Azo had given the substance in his text, while a few of those that I have selected were chosen on account of their curiosity or their far-fetchedness. It seemed desirable that English readers should feel that Azo has, or believes himself to have, chapter and verse for all that he says.

As the form of his work may be strange to some who look at this book, two remarks about it may be useful. The medieval civilian always has a pupil in view ; he is didactic ; he is telling a learner what he ought to say about the law. Hence a constant use of the imperative *Dic*. Some say this ; some say that ; but do you say (*dic*) what I tell you. Where the modern English text-writer would talk of 'the better opinion,' the legist will use *Dic*. Secondly, he is expounding a set of books issued by the Emperor Justinian. Therefore *Imperator Iustinianus* is often the suppressed subject of a verb, especially of *ponit*. Thus, on passing to a new topic, we shall be told that 'he' puts (*ponit*, *supponit*) in the next place the following doctrine or distinction. Who puts it ? The legislator, *Dominus Imperator*. So let the reader remember that he himself is Azo's 'you,' while Azo's 'he' is the Emperor Justinian.

THE TEXT OF BRACTON.

Our text is taken from the Bodleian MS., Digby 222, of which an account is given in Appendix IV. All substantial variations of this from the vulgate text (i.e. the text printed in 1569) are, it is hoped, duly noted. A pretty thorough collation has also been made of the MSS. which in the following list are indicated by *Corb. Ed. Cr. Reg.* The other MSS. there mentioned have only been occasionally examined. At the Phillipps MSS. I have looked merely in order to see whether any of them would be of much service in restoring Bracton's marginalia to their proper place. As to spelling, I have tried to adopt the forms used in modern editions of classical Latin books. Though in general an advocate of an exact reproduction of medieval texts, I thought that, as passages from the Code and Digest were to be mixed up with what was written by Azo and by Bracton, I should best consult the reader's convenience by taking this course. He will know that the MSS. are full of *compendia*, that they give a simple *e* instead of *ae*, that they often have a *c* where our text has a *t*, and so forth. If my spelling is not as uniform as it ought to be (and I am far too ignorant to defend it), I may plead in mitigation that my MSS. came from the thirteenth or fourteenth century, my printed copy of Azo from the fifteenth, my printed copy of Bracton from the sixteenth, my *Corpus Iuris* from the nineteenth.

LIST OF BRACTON MSS THAT ARE REFERRED TO.

Dig.	=	Bodleian, Digby, 222.
Corb. (Corbet)	=	Bodleian, Bodley, 170.
Ed. (Edensore)	=	Mus. Brit. Harl. 817.
Cr. (Crewe)	=	Mus. Brit. Ad. 11353.
Reg. (Royal)	=	Mus. Brit. Royal, 9. E. 15.
Gl. (Glastonbury)	=	Mus. Brit. Ad. 21614.
Chert. (Chertsey)	=	Mus. Brit. Ad. 24067.
St. (Stowe)	=	Mus. Brit. Stowe, 380.
Ha. (Harley)	=	Mus. Brit. Harley, 656.
Gr.	=	Gray's Inn.
PA	=	Phillipps, 136.
PB	=	Phillipps, 3097.
PC	=	Phillipps, 8126.
PD	=	Phillipps, 3510.
PE	=	Phillipps, 8842.
Vulg.	=	Printed edition of 1569.

ADDITION.

The Basel edition of Azo has the following discussion of the case of the *adscripticii* instead of the one brief sentence (p. 44) that is given by the Speier edition and the two MSS. at Caius College. Whether it comes from Azo or from a later hand I cannot say.

Nec est oppositio de adscripticio, quia fere liber est. immo videtur quod vere sit servus, cum inter adscripticios et servos nulla sit differentia, ut C. *de agri. et censi.* l. *ne diutius* § *si quis* [C. 11. 48. 21. § 1]. sed certe verum est quod nulla sit differentia quantum ad hoc, ut si nascatur quis ex libero vel servo et adscripticia, sit adscripticius, sicut si nasceretur ex libero vel adscripticio et ancilla esset servus, ut ibidem dicitur. est enim differentia quantum ad alia multa, quia servi nihil proprium habere possunt, quia quicquid per servum acquiritur, id domino acquiritur, ut in. *de his qui sunt sui vel alie. iuris* § *in potestate* [Inst. 1. 8. § 1]. adscripticii autem bene habere possunt proprium, ut C. *de agri. et censi.* l. *hi penes* [C. 11. 48. 4], licet quodam servitio sit adstrictus, ut C. *de epis. et cle.* l. *iubemus* et auth. *adscripticios* [C. 1. 3. 36 ; Const. 134 (Nov. 123), c. 17].

BRACTON AND AZO

I.

Domini Azonis incipit proemium ad summam institutionum.

Quasi modo geniti pueri vel adulti lac iuris concupiscite, institutionum dogmata sumite, primum nutrimentum, ut doctrina praeambula informati Iustiniani mereamini sanctioni¹ securius inhaerere, quae a christianissimo imperatore Iustiniano regulariter derivata omnium imperatorum auctoritate iubet, vetat, vindicat, punit atque permittit. Haec siquidem velut almifica dominatrix 'nobilitat addiscentes,' exhibet magistratus 'et honores conduplicat et profectus,' et ut vera per omnia fatear, iuris professores per orbem terrarum fecit² solemniter principari 'et sedere in' imperiali 'aula, tribus et nationes, actores et reos, ordine dominabili 'iudicantes.' Per ipsam namque universi reges regnant, iustitia conservatur in terris, et licet Romanus princeps sit legibus absolutus, tamen digna vox est maiestate regnantis legibus alligatum se principem profiteri, ut *C. de leg. et con. prin. l. digna vox.*

[C. 1. 14. 4. Digna vox maiestate regnantis legibus alligatum se principem profiteri.]

Ad notitiam ergo legum habendam, quae constringunt vitas³ hominum, debet quilibet anhelare ne per iuris ignorantiam a rectitudinis tramite deviare cogatur. Sed habet quaelibet scientia principia et radices, super quibus regulare constituitur fundamentum. unde fideliter consulo his, qui causarum patroni esse peroptant, ut sine institutionum doctrinis ad legum sublimitates conscendere non

¹ Sic Pap. Ven. Gonv. Cai.; *mere aministratiōi* Sp.

² *facit* Gonv. Cai. ³ Sic Gonv. Cai.; *qua constringitur unitas* Sp.

I.

*Incipit liber primus a Henrico de Brattone compositus de legibus regni Angliae et consuetudinibus.*¹

[I. 1. § 1.] ‘In rege qui recte regit necessaria sunt duo [cf. 1] ‘haec, arma videlicet et leges, quibus utrumque tempus ‘bellorum et pacis recte possit gubernari. utrumque enim ‘istorum alterius indiget auxilio, quo tam res militaris ‘possit esse in tuto, quam ipsae leges armorum podio² sint ‘servatae.’ si autem arma defecerint contra hostes rebelles et indomitos, sic erit regnum indefensum: si autem leges, sic exterminabitur iustitia, nec erit qui iustum faciat iudicium.

[I. 1. § 2.] Cum autem fere in omnibus regionibus utatur³ legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine. in ea quidem ex non scripto⁴ ius venit quod usus comprobavit. sed non erit absurdum leges Anglicanas, licet non scriptas, leges appellare, cum legis vigorem habeat quicquid de consilio et consensu magnatum et reipublicae communi sponsione, auctoritate regis sive principis praecedente, iuste fuerit definitum et approbatum. Sunt etiam⁵ in Anglia consuetudines plures et diversae secundum diversitatem locorum. habent enim Anglici plura⁶ ex consuetudine quae non habent ex lege, sicut in diversis comitatibus, civitatibus, burgis et

¹ This incipit is from Gr.

² Sic Dig. Corb. Cr. Ed., also Azo; *leges usu armorum et praesidio possint esse servatae* Vulg.

³ *utantur* Vulg.

⁴ *non ex scripto* Cr.

⁵ Sic Dig. Cr. Ed.; *Sunt autem* Vulg.

⁶ Sic Dig. Corb. Cr. Ed.; *plurima* Vulg.

praesumant, cum 'ex alto' irremediabiliter 'corrui qui
'volare satagit antequam pennas assumat.' Ego autem
Azo, cupiens iuxta promissum perficere quod incepti, hanc
institutionum summam rudibus offero et profectis,¹ ut ex
ea quisque pro ingenii sui capacitate subsidium recipiat et
iuuamen.

In Nomine Domini Nostri Hiesu Christi Imperator
Caesar Flavius Iustinianus, Alamanicus, Gothicus, Francus,
Germanicus,² Guandalicus, Africanus, Pius, Felix, Inclitus,
Victor ac Triumphator Semper Augustus, Iuventuti³
Cupidae Legum.

Cuius proemii domini Iustiniani sententiam aperte
comprehendamus. Facta igitur codicis prima composi-
tione, ut C. *de veteri i. enu.* ij. l. § *omnia igitur* et § *sed cum*
prospeximus [C. 1. 17. 2. §§ 11. 12], ante eius⁴ emenda-
tionem et secundam editionem⁵—nam cum praecepit fieri
editionem secundam, habuit mentionem institutionum iam
compositarum, ut C. *de emen. iusti. co.* ibi *ut undique non*
solum etc. [De emendatione codicis § 3]—et digestorum
seu pandectarum l. libris perfectis et consummatis, vide-
batur plerisque nihil ammodo super iuris compositionem
tractandum, immo Iustiniano imputandum quod, armorum
usu relicto, legibus et scholasticis disciplinis operam dabat,
eum imperator Gordianus dicat milites arma scire debere
non leges, ut C. *de iur. deli.* l. ulti. in prin.

[C. 6. 30. 22 pr. Arma etenim magis quam iura
scire milites sacratissimus legislator existimavit.]
et imperator sit miles et alios appellet commilitones, ut ff.
de mili. te. l. i.

[D. 29. 1. 1 pr. . . . secutus animi mei integritu-
dinem erga optimos fidelissimosque commilitones . . .]
et appellatione familiae princeps familiae contineatur, ut ff.
de ver. si. l. *familiae appellatione.*

[D. 50. 16. 196. Familiae appellatione et ipse
princeps familiae continetur.]

¹ *profectis* Govv. Cai.

² Insert *Alanicus* Govv. Cai.; *Anticus* omitted.

³ *Iuventute* Sp.

⁴ *cuius* Pap. Ven.; *eius* Sp.

⁵ *edictionem* Sp. Govv.

villis, ubi semper inquirendum erit quae sit illius loci consuetudo et qualiter utantur consuetudine qui consuetudines allegant.

[I. 1. § 3.] Cum autem huiusmodi leges et consuetudines per insipientes¹ et minus doctos, qui cathedram iudicandi ascendunt antequam leges didicerint, saepius trahantur ad abusum, et qui stant in dubiis et in opinionibus, et² multotiens pervertantur a maioribus, qui potius proprio arbitrio quam legum auctoritate causas decidunt, ad instructionem saltem³ minorum, ego Henricus de Brattone⁴ ‘animum erexi’ ad vetera iudicia iustorum, perscrutando⁵ diligenter, non sine vigiliis et labore, facta ipsorum, consilia et responsa, et quicquid inde nota⁶ dignum inveni in unam summam redigendo sub ordine titulorum et paragraphorum, sine praeiudicio melioris sententiae, compilavi, scripturae suffragio perpetuae memoriae commendanda, postulans a lectore ut si quid superfluum vel perperam positum in hoc opere invenerit, illud corrigat et emendet, vel ‘conniventibus oculis’ pertranseat, cum omnia habere in memoria et in nullo peccare divinum sit potius quam humanum.

[I. 2. § 1.] ‘In hoc autem tractatu sicut in aliis [f. 1 b] ‘tractatibus considerata sunt haec, scilicet, quae sit ‘materia, quae intentio, quae utilitas, quis finis et cui parti ‘philosophiae supponatur.’ [§ 2.] Et sciendum quod materia est facta et casus qui quotidie emergunt et eveniunt in regno Angliae, ut sciatur quae competat actio, et quod breve, secundum quod placitum fuerit reale vel personale, et super⁷ huiusmodi⁸ conficienda acta⁹ sive irrotulationes, secundum proposita et obiecta, agendo et probando, defendendo et excipiendo et replicando et huiusmodi. [§ 3.] Intentio autem auctoris est tractare de huiusmodi¹⁰ et instruere et docere omnes qui edoceri desiderant qualiter et quo ordine lites et placita decidantur secundum leges et

¹ *incipientes* Cr.

² *Sic* Dig. Corb. Cr. Ed.; omit *et* Vulg.

³ Omit *saltem* Cr. Ed.

⁴ *ego talis* Dig. Cr. Ed. Sh. Ch. St. Ha., and almost all MSS.; *Ego H. de Bractone talis* Corb.; *ego talis* H. P. A.; *ego talis*, but *H. de Brattone* supplied by coeval hand in P. B.; *ego H. de Brattone*, Gr.

⁵ *Sic* Dig. Cr. Ed.; *perscrutanda* Vulg.

⁶ *notatu* Vulg.; *notari* Ed.

⁷ *circa* Cr. Ed.

⁸ *hiis* Vulg.

⁹ *confiendi acta* Dig.

¹⁰ *hiis* Vulg.

Imperator autem ad hoc sui defensionem et excusationem, et excusationis rationem assignando, sufficientissime respondet, et assignat¹ duo tempora unum bellorum et alterum pacis. In tempore bellorum necessaria sunt ad summae reipublicae tuitionem ista quatuor, arma, usus armorum, victoria, triumphus. In tempore pacis necessaria sunt quatuor similia, leges, scilicet, usus legum, calumniae pulsio, iuris religio. Princeps enim, hostibus victis, fit triumphator, vel triumphatur, et expellendo iniquitates calumniantium per legitimos tramites, ut per iusiurandum calumniae, per infamiam, per poenam pecuniariam, ut infra *de pe. temere* li. [Inst. 4. 16.], fit iuris religiosissimus. ‘Ista ergo duo, arma et leges, pariter debent esse in principe, et alterum semper eguit alterius auxilio, et tam militaris res legibus est in tuto collocata, quam ipsae leges armorum podio² servatae sunt,’ ut C. *de iusti. co. confir.*

[*De Iustiniano codice confirmando* pr. Istorum etenim alterum alterius auxilio semper eguit,³ et tam militaris res legibus in tuto collocata est quam ipsae leges armorum praesidio servatae sunt.]

et tanta gaudent similitudine pariter et splendent utilitate, ut nomen armorum et nomina eorum qui exercentur in armis accomodentur legibus et legistis. Leges ergo dicuntur arma et imperator legibus dicitur armari, ut in principio huius proemii.

[Inst. Proem. Imperatoriam maiestatem non solum armis decoratam sed etiam legibus oportet esse armatam.]

et milites dicuntur advocati. nec enim solos nostro imperio militare credimus illos, qui gladiis et thoracibus nituntur, sed etiam milites commilitant⁴ namque patroni causarum, qui gloriosae vocis confisi munimine, laborantium spem, vitam et posteros defendunt, ut C. *de advoc. diver. in. l. advocati.*

[C. 2. 7. 14. Advocati qui dirimunt ambigua fata causarum . . . non minus provident humano generi,

¹ assignat Pap. Ven. ; assignet Sp.

³ viguit aaccepted reading.

² Sic Pap. Sp. Ven. Gonv. Cai.

⁴ militant, Gonv. Cai.

consuetudines Anglicanas et de huiusmodi¹ habere tractatum, ut doceantur et corrigantur errantes, puniantur contumaces. Item communis intentio est de iure scribere,² ut rudes efficiantur subtiles, subtiles subtiliores, 'et homines mali' efficiantur boni et boni meliores, tum metu poenarum tum 'exhortatione praemiorum, iuxta illud,

Oderunt peccare boni virtutis amore
Oderunt peccare mali formidine poenae.'

[§ 4.] Utilitas autem est quia³ 'nobilitat addiscentes' 'et' 'honores conduplicat et profectus et facit eos principari in' 'regno et sedere in aula' regia in sede ipsius regis quasi in throno dei, 'tribus et nationes,⁴ actores et reos ordine' 'dominabili iudicantes,' vice⁵ regis, quasi vice Ihesu Christi, cum rex sit vicarius dei. ⁶indicia enim non sunt hominis sed dei et ideo cor regis bene regentis dicitur esse in manu dei.⁶ [§ 5.] Item⁷ 'finis huius rei est ut sopiantur iurgia' 'et vitia propulsentur' et ut in regno conservetur pax et iustitia. 'Ethicae vero supponitur,' quasi morali scientiae, 'quia tractat de moribus.'

[I. 2. § 6.] Huiusmodi vero leges Anglicanae et consuetudines regum auctoritate iubent quandoque, quandoque vetant, et quandoque puniunt transgressores. quae quidem, cum fuerint approbatae consensu utentium et sacramento regum confirmatae, mutari non poterunt nec destrui sine communi consensu⁸ eorum omnium, quorum consilio et consensu fuerunt promulgatae. in melius tamen converti possunt, etiam sine eorum consensu, quia non destruitur quod in melius commutatur. Si autem aliqua nova et inconsueta emergerint, et quae prius usitata non fuerint in regno, si tamen similia evenerint, per simile iudicentur, cum bona sit occasio a similibus procedere ad similia. si autem talia prius nunquam evenerint, et obscurum et difficile sit eorum iudicium, tunc ponantur iudicia⁹ usque

¹ *hiis* Vulg.

² *scribentium* would be acceptable, but has not been found.

³ *Sic* Dig. Cr. Ed.; *quae* Vulg.

⁴ *nasciones* Dig.

⁵ Omit *vice* Dig. Corb.; interlined in Cr.

⁶ Omit Corb.

⁷ Omit *item* Vulg.

⁸ *Sic* Dig. Cr. Ed.; insert *et consilio* Vulg.

⁹ *Sic* Dig. Cr. Ed.; insert *in respectum* Vulg.

quam si proeliis atque vulneribus patriam parentesque salvarent. nec enim solos nostro imperio militare credimus illos qui gladiis, clupeis et thoracibus nituntur, sed etiam advocatos. militant namque causarum patroni, qui gloriosae vocis confisi munimine, laborantium spem, vitam et posteros defendunt.]

Est ergo militia alia armata alia inermis vel¹ litterata ut *C. de proximis sacro. scri. l. proximos.*

[*C. 12. 19. 8. Proximos sacrorum scriniorum, quos fides ac diuturnae observationis industria litterataque militia . . . commendant.*]

bella etiam, etsi non iura dicantur, de iure tamen gentium fiunt praecepto imperatoris vel populi Romani. Dicet quis—Si ista duo debet habere Imperator, et tu Iustiniane qualiter te habuisti in eis? Inquit Iustinianus—Primam communium rerum sustentationem, id est, usum armorum non omisi, immo ad eam intensionem et laborem meum retuli, et militaria agmina cum omni providentia multiplicibus et congruis modis correxi, vetera ad meliorem statum deducendo, et nova constituendo sine novis expensis publicis, ut *C. de iusti. co. fir.* [*C. De Iustiniano codice confirmando. pr.*]. istam ergo viam cum summis vigiliis et summa providentia, annuente deo, perfeci. hoc enim protestantur barbaricae gentes et aliae innumerosae provinciae sub ditione Romani imperii subiectae vel deductae. Africa etiam et sub ea contentae provinciae protestantur, quam Guandali occupaverunt et ut captivam detinuerunt centum² et v. annis, et per dei misericordiam iterum subieci eas Romano imperio, ut in principio huius proemii et *C. de off. praefec. prae. afri. l. i.*

[*Inst. Proem.* Et bellicos quidem sudores nostros barbaricae gentes sub iuga nostra deductae cognoscunt et tam Africa quam aliae innumerosae provinciae . . . iterum ditioni Romanae nostroque additae imperio protestantur.

C. 1. 27. 1. 1. . . . ut Africa per nos tam brevi

¹ *Sic Gonv. Cai.; alia Sp.*

² *Sic Sp. Pap. Ven. Gonv. Cai.*

ad magnam curiam, ut ibi per consilium curiae terminentur: licet sint nonnulli, qui de propria scientia praesumentes, quasi nihil iuris ignorent, nolunt alicuius consilium expetere. et quo casu honestius et consultius foret eis consilium habere quam aliquid temere definire, cum de singulis dubitare non sit inutile.

[I. 2, § 7.] Sedem quidem iudicandi, quae est quasi thronus dei, non praesumat quis ascendere insipiens¹ et indoctus, ne lucem ponat tenebras, et tenebras lucem,² et ne³ manu indocta, modo furientis, gladio feriat innocentem [f. 2] et liberet nocentem, et ‘ex alto corruat⁴ quasi a throno dei, ‘qui volare inceperit antequam pennas assumat.’

[I. 2, § 8.] Et cum quis iudicare debeat et iudex fieri, caveat unusquisque sibi, ne perversè iudicando et contra leges precè vel pretio, pro temporalis lucelli commodo, aeterni luctus maestitiam sibi comparare praesumat, et ne in die furoris domini sentiat ipsum vindicantem, qui ait, *Mihi vindictam, et ego retribuam*, et ubi flebunt et plangent reges et principes terrae, cum viderint filium hominis, propter timorem tormentorum eius, ubi aurum et argentum non valebit liberare eos. Quis autem non timeat illud examen, in quo erit dominus accusator, advocatus et iudex? a sententia autem sua non poterit provocari: quia pater omne iudicium dedit filio, qui claudit et nemo aperit, aperit et nemo claudit. O districtum iudicium, quo non solum de actibus, verum etiam de omni verbo otioso, quodcumque⁵ locuti fuerint homines, reddituri sunt rationem. Quis ergo effugere poterit a ventura ira? Mittet enim filius hominis angelos suos, qui colligent de regno dei omnia scandala, et eos qui faciunt iniquitatem, et ex eis alligabunt fasciculos ad comburendum, et mittent eos in caminum ignis, ubi erit fletus et stridor dentium, gemitus et ululatus, eiulatus, luctus et cruciatus, stridor et clamor, timor et tremor, dolor et labor, ardor et foetor, obscuritas et anxietas, acerb-

¹ incipiens Cr.

² Sic Dig. Ed. Gl. St.; *lucem ponat in tenebras et tenebras in lucem* Vulg. Sh. Ch. Ha.; *in* and *in* interlined in Reg. See Isaiah v. 20.

³ Sic Dig. Cr. Ed.; insert in Vulg.

⁴ corruet Dig.

⁵ Sic Dig. Corb. Cr. Ed.; *quod inique* Vulg.

tempore reciperet libertatem ante centum ¹ et quinque annos a Vandalis captivata. . . .]

Secundam vero viam iustitiae et legum omnes populi protestantur, nedum in verbis sed etiam rebus ipsis et factis, cum legibus a me compositis et promulgatis regantur. ecce enim extendi curam meam ad imperiales constitutiones, easdemque in luculentam reduxi consonantiam. postea extendi curam meam in immensa volumina veteris digestorum prudentiae seu pandectarum, ut in hoc proemio § *Omnes* [Inst. Proem. §§ 1. 2.], et, his completis, deliberavi an esset aliquid promulgandum, ut rudis animus studiosi simplicibus enutritus, facilius ad altioris prudentiae redigatur scientiam, ut *C. de veteri iu. c. l. i. § Romam autem*.

[*C. 1. 17. 1. § 10 . . . Romam autem intellegendum est non solum veterem sed etiam regiam nostram, quae deo propitio cum melioribus condita est auguriis. § 11. Ideoque iubemus duobus istis codicibus omnia gubernari . . . vel si quid aliud a nobis fuerit promulgatum institutionum vicem obtinens, ut rudis animus studiosi simplicibus enutritus facilius ad altioris prudentiae redigatur scientiam.*]

Tandem, habita deliberatione, prospexi quod ad portandam tantae sapientiae molem non sunt idonei homines rudes, et qui in primis legum vestibulis stant, et intrare ad arcana eorum properant, et aliam mediocrem eruditionem censui praeparandam,² ut sub ea colorati et quasi primitiis omnium imbuti possint ad penetralia eorum intrare et formam legum pulcherrimam, non conniventibus oculis, accipere. iura³ enim populi Romani ita commodissime possunt tradi, si primo levi ac simplici, deinde diligentissima atque exactissima interpretatione singula tradantur. alioquin si statim ab initio rudis adhuc et infirmus animus studiosi multitudine ac varietate rerum⁴ oneretur, duorum alterum fiet, quia aut deseret studium aut cum magno labore eius, saepe et cum diffidentia, quae plerumque iuvenes avertit, serius ad id produceretur, ad quod levio-

¹ *nonaginta* Mommsen.

² *Sic* Gonv.; *properandum* Sp. Pap. Ven. Cai.

³ *iura* Ven.; *iure* Sp. Pap.

⁴ *Omit rerum* Sp. Cai.

tas et asperitas, calamitas et egestas, angustia et tristitia, oblivio et confusio, tortiones et punctiones, amaritudines et terrores, fames et sitis, frigus et cauma,¹ sulphur et ignis ardens in secula seculorum. Caveat etiam² quilibet iudicium illud, ubi index terribiliter districtus, intolerabiliter severus, immoderate offensus, vehementer iratus, sententia eius incommutabilis, carcer irremeabilis, tormenta sine fine, sine intervallo,³ tortores horribiles qui nunquam lassescunt,⁴ nunquam misereantur, timor rerum conturbat, conscientia damnat, cogitationes increpant, et fugere non licet. unde beatus Augustinus : *O quam magna peccata mea sunt nimis ! unde cum quis deum habuerit iustum iudicem, et conscientiam suam testem, nihil timeat nisi causam suam.*

NOTES.

Bracton's preface is coloured by the preface to the Institutes, by the prefaces of Azo's two Summae, and by Glanvill's introductory remarks. It begins with a sentence that goes back to Justinian but is taken more immediately from Azo. The king who rules aright has need both of arms and of laws. Arms and laws aid each other. According to the text of the Constitution which confirmed the Code, '*ipsae leges armorum praesidio servatae sunt.*' Instead of *praesidio*, Azo both here and elsewhere seems to have written *podio*, and the best Bracton MSS. have *podio*. Arms are preserved by a support of laws. The word *podium* was used in the middle ages for many purposes. Du Cange defines it as '*res quaevis cui innitimur.*' It is the origin of our English *pew*, and appears also in the French *appui*.

Then at once Bracton turns from these classical phrases to England. In almost all other countries respect is paid to the *leges* and the *ius scriptum* : in other words, to the Code and the Digest. In England what prevails is *ius non scriptum et consuetudo*, and what is approved by usage becomes unwritten law. Bracton is greatly exaggerating the triumph of Roman law on the continent of Europe ; probably he is taking some Italian doctor at his word.

Then (§ 2) comes an apology, suggested by Glanvill's prologue, for the application of the word *leges* to the unwritten law of England. In this context Glanvill had played with the text '*sed et quod principi placuit legis habet vigorem.*' Bracton will not touch this

¹ Sic Dig. Cr. Ed. ; *camina* Vulg.

² Sic Dig. Cr. Ed. ; *caveat igitur* Vulg.

³ Sic Dig. Cr. Ed. ; insert *et sine temperamento* Vulg. ⁴ *lascunt* Dig.

via ductus, sine magno labore eius et sine magna¹ difficultate, maturius perducere potuisset. Convocatis ergo viris illustribus et facundissimis antecessoribus Tribuniano, Theophilo² et Dorotheo, mandavi ut componerent institutiones, et in quatuor libros iussi partiri, ut sint totius legitimae scientiae fundamenta prima et elementa, quibus iuvenes suffulti graviora possint et perfectiora legum scita³ sustentare, ut *C. de re. iu. e. l. ij. § sed cum*, et in hoc proemio § *cumque*, et infra *de iusticia et iu. § his* [*C. 1. 17. 2. § 11; Inst. Proem. § 3; Inst. 1. 1. § 2*]. Et in eo mandato praefati facundissimi viri opportune paruerunt, et eas compositas mihi obtulerunt, quas cum legi et cognovi, plenissimum nostrarum constitutionum eis robur accommodavi.

Liquet igitur quod imperator a nemine reprehendi, immo ut christianissimus et sanctissimus ab omnibus hominibus, tam in opere praesentis libri, quam in ceteris, debet commendari et venerari. Videamus ergo quare dicatur liber institutionum vel elementorum, quae fuerit occasio condendi eius vel ceterorum librorum iuris, ‘quae intentio, ‘quis finis sive utilitas, et cui parti philosophiae supponatur.’

Dicitur autem liber institutionum quasi instructionum, quia in his primis legum praeceptis instruimur, ut possimus percipere maiora iura et ad iuris arcana valeamus conscendere et ingredi ad legum penetralia. vel dicitur institutionum quia⁴ in statum Romani iuris nos erigit. cum enim tres sunt positiones corporis, statio, sessio, cubatio, plurimum homo potest cum stat quam cum sedeat iaceatve. tunc enim debilior est. inde est quod in liberalibus disciplinis, in grammatica, dialectica, iacemus atque sedemus, id est, debiles sumus, easque disciplinas non discere sed didicisse debemus. per hanc autem disciplinam stantes efficimur, id est, fortiores reddimur, quia moribus informamur. Potuit et iste liber introductorius, sicut et

¹ Corr. *sine ulla* Gonv. Cai.

² *Theochiro* Sp.; *Theophyro* Gonv.; *Theophiro* Cai.

³ *sita* Pap. Ven. See Const. *Tanta* § 11.

⁴ *quasi* Sp.

dangerous passage, at all events on the first page of his book. What has the force of law in England is not 'quod principi placuit,' but 'quicquid de consilio et consensu magnatum et reipublicae communi sponsione, auctoritate regis sive principis praecedente, iuste fuerit definitum et approbatum.' There is here an echo of Papinian's famous definition (D. 1. 3. 1): 'Lex est commune praeceptum, virorum prudentium consultum, delictorum, quae sponte vel ignorantia contrahuntur, coercitio, communis rei publicae sponsio.' Since assizes, ordinances, provisions, and the like are in writing, and there would therefore be no difficulty about calling them *leges*, Bracton seems to be here protesting that a rule which has its origin and its warrant in the practice of the king's court may properly be called a *lex*. The magnates, as he elsewhere (f. 414 b) says, consent if they do not dissent, and *reipublicae communis sponsio* is a fine phrase justified by tacit approbation. With such a *lex* we contrast those local customs, in proof of which we require evidence of actual usage.

Then (§ 3) we come to the purpose of our book. The statement that men who are ignorant of the *leges* are ascending the judicial bench should be noticed. Also the statement that the magnates (*maiores*) are perverting the law. Our author hardly hopes to influence the great; it is for the instruction 'at all events of the smaller folk (*ad instructionem saltem minorum*)' that he writes. He appeals from the present to the past; he has sought out the ancient judgments of the just, and considered their *facta, consilia et responsa*. These words have a romanesque tinge, but Bracton does cite not only *iudicia*, but also *responsa* of Martin Pateshull (f. 125 b, 128), answers to questions addressed to him by his fellow judges. Some other phrases betray the Azonian influence: *erexi animum—conniventibus oculis*; and Bracton's account of his own purpose may be coloured by Azo's account of Justinian's exploits:—Justinian had enucleated the *vetus ius*; Bracton has collected *vetera iudicia*. Also he calls his work a *Summa*. Lastly, his final phrase is from Azo's prologue to his work on the Code:—'Quia omnium habere memoriam et in nullo peccare divinitatis est potius quam humanitatis.' Characteristically enough, however, the apology which Bracton offers for his own shortcomings is offered by Azo for the shortcomings of his predecessor Placentinus. About his own work Azo professes no diffidence.

At the beginning of each *Summa*, Azo in scholastic fashion discusses the nature of the book that he is going to expound. We have to consider (1) its matter (*materia*), and this is (a) general, (b) common, (c) particular (*propria*); (2) the author's intention, and this again is (a) general, (b) common, (c) particular; (3) the 'end' or 'utility' at which he has aimed; and lastly (4) we have to assign the head of philosophy under which his work falls. The discussion as to the nature of the Institutes is printed above. The discussion as to the nature of the Code is more elaborate. We will here give a brief outline of it, for Bracton has looked at it.

ceteri libri introductorii, appellari liber introductionum sive ysagogarum, sed visum est iuri civili congruentius nomen institutionum. Elementorum autem dicitur liber per similitudinem quatuor elementorum. sicut enim quatuor elementis totus mundus confectus est, sic et ex hoc volumine in quatuor libros distincto¹ omnia iuris arcana revelantur et totius Romani iuris scientia praelibatur. Vel dicitur elementorum per similitudinem primarum litterarum quae vocantur elementa, sicut enim prima illa elementa primo pueris legenda traduntur, sic et haec legum initia primo iuvenibus vel legum tironibus exponuntur. et dicuntur elementa quasi elevamenta, quia in his, quasi legum primitiis suffulti, iuvenes elevantur ad altissima legum scita. Vel dicuntur elementa quasi elimamenta,² quia in his elimatur quicquid fuerat in veteri iure rubiginosum, elimatur quicquid fuerat hirsutum et hispidum, complanatur quicquid fuerat montuosum, fabricatur aequitati argenteum palatium, erigitur iustitiae solium. Dicitur etiam Iustiniani liber, ut sciatur nomen auctoris, et ad differentiam aliarum institutionum antiquarum.

Huius libri condendi occasio fuit talis. Placuit³ Romanis, qui urbem muris fundaverant, fundare eam et legibus. siquidem leges quaedam et paucae quas Romani reges tulerant, propter eorum superbiam iam exoleverant. electi itaque x. viri missi sunt ad Graecas civitates, quarum una vocabatur Athenae et utebatur iure scripto, altera Lacedaemon et utebatur iure non scripto. perrexerunt, pervenerunt, petierunt, acceperunt et attulerunt x. tabulas eboreas de iure scripto et iure non scripto, easque Romae pro rostris posuerunt, ut ab omnibus apertius legi et intellegi possent. quarum x. tabularum interpretatio, cum visa sit obscura populo, data est x. viris summa potestas in eo anno, uti homines ab eorum sententiis non appellarent, et ut x. tabularum leges exponerent, corrigerent, et adderent et detraherent, si quid esset detrahendum vel addendum.

¹ *distincto* Cai.; *distinctio* Gouv.; *distinctos* Sp.

² Const. *Tanta* § 11 brings *elementa* into near contact with *climatum*.

³ A free use is here being made of D. 1. 2. 2.

The 'general matter' of the Code consists of law, justice and affairs (*ius, iustitia, item negotia*); also of two vices—error and contumacy. The 'general intention' of princes in publishing books of law is to treat of law and justice, so that bad men may be made good, and good men better, by the fear of punishment and the hope of reward (here we improve upon Horace 'Oderunt peccare boni,' &c.); as to affairs, their intention is to show how causes shall be decided; and as to the two vices, these are to be expelled. The 'common matter' and 'common intent' are next described. 'Communis materia omnium principum est rudis aequitas, ius approbatum, et id [quod] observatur pro lege et iure. Super quibus omnibus intendunt principes. Super rudi aequitate intendunt ipsam eruere, praeceptis redigere, redactam subditis conservandam iniungere et sub idoneis titulis collocare. Super iure approbato, intendunt principes quatuor modis, interpretando, corrigendo, artando et prorogando. . . . Super eo quod observatur pro lege et iure intendunt principes multipliciter, super ultimis deficiente voluntatibus, et super pactationibus contrahentium quae legis vicem optinent . . . idem super iudiciis et sententiis.' This leads Azo away into a long disquisition on the interpretative work of law, by which he means the introduction of fictions, and to illustrate this he takes us through the Aristotelian categories. At last he comes to the 'particular' (*propria*) matter of the Code, and the particular purpose of Justinian in issuing it. The particular matter consists of the three older Codes and the 'extravagant' (*i.e.* uncodified) constitutions; and Justinian's purpose is to fuse them into one Code. The 'end or utility' of the work is a cheap and speedy decision of suits. Finally, the part of philosophy to which it is subjected is ethics, for it treats of morals, as do all books of legal science.

Bracton has borrowed from this as well as from the parallel discussion about the Institutes; but while Azo discusses the nature of the books on which he is going to comment, Bracton has to discuss (p. 7) the nature of a book which he is going to write. As to 'matter' of course he has to describe this in his own words. It consists of the acts and events which daily happen in England, so that we may know to what actions they give rise. As to 'intention,' the author means to teach all, who may wish to be taught, how causes are decided according to the laws and the customs of England. Then in Azonian sentences he describes the 'common' intention of those who write on law and the 'utility' of his own work. Here he soars even higher than Azo. It is not enough for him that the judge sits in the king's hall (Azo's *imperiali aula*); he sits, as it were, on the throne of God, for the king is God's vicar. The 'end' (which somehow or another has become separated from the 'utility') is described in Azonian words, and ethics is declared to be the appropriate part of philosophy.

Though there are some echoes of Azo in c. 2. § 6 (p. 7), its substance is Bracton's own. He feels that he ought to say something about the

unde factum est ut adderent duas tabulas, et sic ex accidenti vocata est lex xij. tabularum. Deinde cum x. viri sequenti anno magistratum sibi iniuriose prorogarent, et populum violenta dominatione premerent, deiecti sunt a populo et in carcere quidam eorum necati sunt. sicque consules facti sunt a populo et senatus consulta composuerunt. Postea constituti sunt praetores et ipsi edicta fecerunt. Emerserunt et alii multi iuris consulti, et ipsi multa responsa condiderunt, et ex senatus consultis et praetoriis edictis et prudentium responsis condita sunt duo milia paene librorum et tricies centena ¹ milia versuum. Post hoc creati sunt imperatores, et ipsi innumerabiles constitutiones composuerunt, et ex illis constitutionibus confecti sunt tres codices, Gregorianus, Hermogenianus et Theodosianus et aliae constitutiones extra vagantes. sicque ventum est usque ad Iustinianum. Videns Iustinianus tantam legum multitudinem tantamque confusionem, et quod lites potius deciderentur iudicis arbitrio quam legum podio,² statuit in mente sua leges emendare et viae dilucidae tradere. Erexit itaque animum suum ad imperiales constitutiones, et ex tribus codicibus et constitutionibus extra vagantibus unum codicem confici iussit, suo felici nomine nuncupandum. Erexit postea animum suum ad immensa volumina veteris prudentiae, et opus desperatum, quasi per medium profundum vadens, coelesti favore adimplevit, et ex duobus paene milibus librorum et ex tricies centenis milibus versuum unicum librum composuit quem digestum appellavit, ipsumque in l. libros distinxit. Ad hoc videns Iustinianus quod ad portandam tantae sapientiae molem animi rudes non sufficerent, statuit eis praeparare quandam eruditionem mediocrem, quasi quandam pontem ad iura maiora et altissima legum scita.

Huius³ libri, sicut et ceterorum librorum iuris, dici possunt materia tria, scilicet, negotia, vel duo vitia, error et contumacia, vel ius et iustitia, sicut et notavimus in materia C.⁴

¹ *trecenties decem* in Const. *Tanta*.

² *Sic* Sp. Pap. Ven. Gonv. Cai.

³ *Huiusmodi* Sp.

⁴ *Sic* Sp. Pap. Ven. With this agree in substance Gonv. Cai. Y. Z. But a

way in which law is made in England, but he seems careful to say little that is definite. Law becomes law when it has been approved by the consent of those who live under it and has been confirmed by the king's oath. This oath can hardly be other than the coronation oath, in which the king swears to maintain the law. The traditional rules administered by his court are thus sanctioned by his oath, while the fact that they have been administered may be sufficient proof of a general consent. Bracton, though he denies to the justices a power of 'changing' the law, claims for them a power of improving it. In a phrase which goes back to the Digest (1. 3. 12.) he describes the manner in which law is extended by means of reasoning which proceeds 'a similibus ad similia.' Unprecedented cases, however, should be reserved for a full court, and should there be decided 'per consilium curiae.' This phrase Bracton uses both here and elsewhere when he is pointing to what we might call the 'equitable' power of the king's court, its power of looking beyond the *rigor iuris*.

The mention of judges who are confident in their ignorance leads to a fervid sermon (p. 9) which is thoroughly un-Azonian. Perhaps Bracton borrowed his account of the torments of hell from some divine, but, as it is made up of biblical phrases, he may well have composed it. It ends with an express citation of S. Augustin. This may refer to Enarratio in Ps. xxxvii. (Migne, *Patrol.* vol. xxxvi. col. 408): 'Quando Deus iudex erit, alius testis quam conscientia tua non erit. Inter iudicem iustum et conscientiam tuam noli timere nisi causam tuam.' The same thought, however, occurs elsewhere in Augustin's works, and the very words that Bracton cites we have not found.

[Azonis Summa C. *Materia ad Codicem*. . . Generalis materia omnium librorum iuris, ergo et codicis, sunt ius, iustitia, item negotia. item duo vitia, error et contumacia.]

Intentio communis est omnium conditorum iuris quemadmodum lites deciduntur, doceantur errantes, puniantur contumaces. 'Item est communis intentio de iure' rescribere et ad id rescribendo¹ operam dare 'ut homines mali efficiantur boni et boni efficiantur meliores, tum metu poenarum, tum exhortatione praemiorum.' Ad hunc finem referuntur omnes conditores 'ut iurgia sint sopita et 'expulsa sint vitia.' Materia singularis domini Iustiniani in hoc opere sunt leges latae, vel duo codices constitutionum et digestorum. Singularis est intentio tradere quandam mediocrem eruditionem quasi quandam pontem per quem iuvenes gradientur. Specialis est utilitas ut, perlecto et cognito institutionum libro, spes pulcherrima foveat iuvenes a singulis in singulis suis partibus suam rem publicam posse gubernari. 'Ethicae supponitur liber iste quia 'tractat de moribus.'

De Iustitia et Iure [Inst. 1. 1].

Imperator Iustinianus expositurus iura populi Romani praemittit de iustitia et iure. 'A iustitia' enim 'velut a' materia et quasi 'fonte quodam omnia iura emanant. 'quod enim iustitia vult idem ius prosequitur. Videamus 'ergo quid sit iustitia, et unde dicatur' et quae sint eius praecepta et quot sint eius positiones. 'Est autem iustitia 'constans et perpetua voluntas ius suum cuique tribuens,' ut ff. e. l. *iustitia*.

[D. 1. 1. 10 pr. Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.]

'quae definitio potest intelligi duobus modis, uno prout

comparison with the parallel passage in the Summa of the Code shows that something has gone wrong here. The *tria* which are the *materia* of law-books are *ius*, *iustitia*, and *negotia*; to which we add the two vices, *error* and *contumacia*.

¹ *et rescribendo ad id* Gouv. Cai.

[*De Iustitia et Iure.*]

[I. 3. § 1.] Videndum est etiam quid sit lex. et sciendum, [f. 2]
 quod lex est commune praeceptum, virorum prudentium consultum,¹ delictorumque quae sponte vel ignorantia contrahuntur coertio, rei publicae sponsio communis. Item ‘auctor iustitiae est deus,’ secundum quod iustitia est in creatore. ‘et secundum hoc, ius et lex idem significant. ‘et licet largissime dicatur lex omne quod legitur, tamen ‘specialiter significat sanctionem iustam, iubentem honesta, ‘prohibentem contraria.’

[I. 3. § 2.] Consuetudo vero quandoque pro lege obser-

¹ *virorum consultum prudentum* Dig.; *virorum consultum prudentium* Ed.

‘est in creatore, altero prout est in creatura. et si intelligatur prout est in creatore, id est, in deo,’ omnia verba proprie posita sunt et ‘plana sunt omnia,’ ‘quasi diceret iustitia est dei dispositio, quae in omnibus rebus recte constituit et iuste disponit. ipse enim retribuit unicuique secundum opera sua. ipse non est variabilis. ipse non est temporalis in dispositionibus vel voluntatibus suis, immo eius voluntas est constans et perpetua. ipse enim nec habuit principium nec habet vel habebit finem. Altero modo intelligitur prout est in creatura, id est, in homine iusto. homo enim iustus habet voluntatem tribuendi unicuique ius suum, et ita illa voluntas dicitur iustitia. et dicitur voluntas tribuere ius suum, non quantum ad actum, sed quantum ad affectionem. sicut et dicitur imperator Augustus, non quod semper augeat imperium, sed quia eius propositi est ut augeat. sed et matrimonium¹ dicitur individua coniunctio, quia eius sunt animi ut nunquam dividantur postea, licet interdum dividantur’ infausto, ut infra *de pa. po.* [Inst. 1. 9] et *C. de repudiis l. consensu.*

[C. 5. 17. 8 pr. Consensu licita matrimonia posse contrahi, contracta non nisi misso repudio solvi praecipimus.]

Illa autem duo verba *constans* et *perpetua* non sunt de definitione, cum scriptum sit quod iustus septies cadit in die, sed ponuntur ad removendam quorundam pravam opinionem, qui credebant iustitiam esse mutabilem, ideo quia quandoque concedit alicui privilegium et postea denegat, ut potest assignari in Iudaeis, ut *C. de Iudaeis l. iussio* et *l. Iudaeos.*

[C. 1. 9. 3.

C. 1. 9. 5. Iussio qua sibi Iudaeae legis homines blandiuntur, per quam eis curialium munerum dabatur immunitas, rescindatur.]

et idem in quolibet qui abutitur privilegio vel iure sibi dato, ut ff. *quod metus causa l. extat* [D. 4. 2. 13], et *C. unde vi l. si quis* [C. 8. 4. 7]. sed certe hoc non est ex varietate iustitiae, immo ex varietate subiectorum vel nego-

¹ *materia* Sp. Pap. Ven; *matrimonium* Gonv. Cai.

vatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet. longaevi enim¹ usus et consuetudinis non est vilis auctoritas etc.

[I. 4. § 1.] ‘Quia a iustitia, quasi a quodam fonte, omnia [f. 2 b] iura emanant, et quod vult iustitia, ius idem prosequitur, videamus igitur quid sit iustitia, et unde dicatur.’ item quid sit ius, et unde dicatur, et quae sunt eius praecepta. item quid sit lex, et quid consuetudo, sine quibus non poterit quis esse iustus, ut faciat iustitiam et iustum iudicium inter virum et virum.²

[I. 4. § 2.] ‘Est autem iustitia constans et perpetua voluntas ius suum cuique³ tribuens. cuius definitio poterit intelligi duobus modis, uno⁴ prout est in creatore, altero prout est in creatura. et si intelligatur prout est in creatore, id est, in deo, plana sunt omnia, cum iustitia sit dei dispositio, quae in omnibus rebus recte constituit et iuste disponit. ipse enim deus tribuit unicuique secundum opera sua. ipse non est variabilis neque temporalis in dispositionibus et voluntatibus suis, immo eius voluntas est constans et perpetua. ipse enim non habuit principium nec habet nec habebit finem. Altero modo intelligitur prout est in creatura, id est in homine iusto. homo enim iustus habet voluntatem tribuendi unicuique ius suum, et ita illa voluntas dicitur iustitia. et dicitur voluntas tribuere ius suum, non quantum ad actum, sed quantum ad affectionem. sicut dicitur imperator Augustus, non quod semper augeat imperium, sed quia⁵ eius propositum est ut augeat. sicut dicitur de matrimonio, quod dicitur⁶ individua coniunctio, quia eius sunt⁷ animi ut nunquam dividantur, postmodo tamen dividuntur’ ex causa. ‘Item dicitur iustitia *constans* secundum definitionem, prout iustitia est in creatura, ut per hoc quod dicit⁸ *voluntas* intelligatur mens, et per hoc quod dicit *constans* intelligatur bonum. constantia enim semper

¹ Insert *temporis* Vulg.

² *virum et uxorem* Cr.; *uxorem* corrected into *virum* Ed. This mistake becomes common. ³ *unicuique* Cr. Ed. ⁴ Insert *modo* Vulg.

⁵ *Sic* Dig. Cr. Ed.; *quod* Vulg.

⁶ *Sic* Dig. Cr. Ed. Azo; *quod sit* Vulg.

⁷ *sunt* repeated Dig.

⁸ *dicitur* Vulg.; and so at the end of the line.

tiorum. Iudaei enim antequam crucifigerent creatorem suum, dominum nostrum, meruerunt habere privilegium. postea autem ex delicto suo meruerunt amittere et puniri. Potest etiam alio modo intelligi definitio prout iustitia est in creatura, ut dicatur data definitio per antifrasi, id est, per circumlocutionem,¹ 'ut per hoc quod dicit *'voluntas'*, intelligatur mens, per hoc quod dicit *'constans'*, intelligatur bonum. constantia enim semper accipitur in bono, unde et sancti dicuntur fuisse constantes.' 'Per hoc quod dicitur *'perpetua'* intelligatur habitus, quasi diceret iustitia est habitus mentis bonus vel bene constitutae. vel iustitia est voluntarium bonum. nec enim potest dici bonum proprie, nisi intercedente voluntate. tolle voluntatem, omnis actus indifferens est, quippe affectio tua nomen imponit operi tuo. et alibi, crimen non contrahitur nisi² intercedat voluntas nocendi. et alibi, voluntas et propositum distinguunt maleficia,' ut C. *ad l. cor. de sic. l. j. et. ff. de furt. l. qui iniuriae.*

[C. 9. 16. 1. Crimen enim contrahitur si et voluntas nocendi intercedat. ceterum ea quae ex improvise casu potius quam fraude accidunt, fato plerumque non noxae imputantur.]

D. 47. 2. 54 pr. Qui iniuriae causa ianuam effregit, quamvis inde per alios res amotae sint, non tenetur furti: nam maleficia voluntas et propositum delinquentis distinguit.]

ergo distinguunt factum bonum a non bono. et ita iustitiae, quae species est virtutis, sui generis attribuitur definitio. Ut autem ostendat quod haec virtus a ceteris speciebus virtutis differat, scilicet, prudentia, temperantia, fortitudine, addit *ius suum cuique tribuens*, quae verba exponentur³ ut dictum est. 'Vel dic *suum ius*, id est, hominis meritum. nam et de iure propter delictum vel pactum non servatum vel similia quis privatur iure suo,' ut ff. *quod metus causa l. extat* [D. 4. 2. 13], et C. *de emph. iur. l. ulti.* [C. 4. 66. 3].

¹ *certam locutionem* Sp. Pap. Ven.; Gonv. Cai. Y. Z. have *circumlocutionem*; Gonv. Y. give *perifrasi*.

² Insert *voluntas* Sp. Pap.

³ *exponentur* Ven.

‘ accipitur in bonum, unde et sancti dicuntur fuisse constantes,’ ubi¹ dicitur, *O constantia martyrum!* item *Constantes estote.* constantia enim non admittit variationem. ‘ Per hoc autem quod dicitur *perpetua* intelligatur habitus, quia iustitia est habitus mentis bonus, vel mentis bene constitutae. vel iustitia est voluntarium bonum. nec enim potest dici bonum proprie, nisi intercedente voluntate. tolle enim voluntatem, et erit omnis actus indifferens. affectio quidem² tua nomen imponit operi tuo. item crimen non contrahitur nisi voluntas nocendi intercedat.’ ‘ item voluntas et propositum distinguunt maleficia.’ ‘ De hoc autem quod dicit *ius suum*, id est³ hominis meritum, nam propter⁴ delictum vel pactum non servatum, vel similia, privatur quis iure suo. De hoc autem quod dicit *cuique*, id est sibi ipsi, ut honeste vivat, item deo, ut deum diligat, item proximo, ut eum non laedat. De hoc autem quod dicit *ius suum*, id est iustitiae, et sic dicitur’ ius ‘ iustitia quia in ea stant omnia iura.’

[I. 4. § 3.] ‘ Ius ergo⁵ derivatur a iustitia, et habet varias significationes. Ponitur enim quandoque pro ipsa arte, vel pro eo quod scriptum habemus de iure, quia ius dicitur ars boni et aequi, cuius merito quis nos sacerdotes [f. 3] appellat. iustitiam namque colimus, et sacra iura ministramus.’ ‘ Item ius quandoque supponitur pro iure naturali, quod semper bonum et aequum est. quandoque pro iure civili tantum. quandoque pro iure praetorio tantum. quandoque pro eo tantum quod competit ex sententia. praetor⁶ enim ius dicitur reddere, et⁷ cum inique decernit, relatione facta non ad id quod praetor fecit, sed ad illud quod praetor facere debuit.’ ‘ Item supponit⁸ quandoque ius pro loco in quo redditur ius.’ ‘ ponit etiam pro necessitudine, sicut pro iure cognationis vel affinitatis. supponit etiam ius quandoque pro actione,

¹ ut Cr. ² enim Cr. Ed.; quippe Azo. ³ id intelligitur Vulg.

⁴ nam et de iure propter Azo. This has more point.

⁵ Sic Dig. Azo; autem Cr. Ed. Vulg.

⁶ praetorium Dig. ⁷ etiam Vulg. Azo.

⁸ Sic Dig. Cr. Ed. Azo; ponitur Vulg.; and so in the following lines. In Azo's text a suppressed *imperator* is the subject of the active verb.

‘Vel dic *cuique*, id est sibi, ut honeste vivat, et deo, ut deum diligat, et proximo ut eum non laedat. Vel dic *suum ius*, id est, iustitiae. Et dicitur iustitia quia in ea stant omnia iura.’

‘Ius ergo derivatur a iustitia et habet varias significationes. Ponitur enim quandoque pro ipsa arte, vel pro eo quod scriptum habemus de iure, et dicitur ars boni et aequi, cuius merito quis nos sacerdotes appellat. iustitiam namque colimus et sacra iura ministramus,’ (unde et leges dicuntur sacratissimae,) boni et aequi notitiam profitentes,¹ aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum verum etiam praemiorum exhortatione efficere cupientes, veram, nisi fallor, philosophiam non simulatam affectantes, ut ff. e. l. j. [D. 1. 1. 1]. Est autem ars secundum Porphirium de infinitis finita doctrina, ab artando dicta. et bene potest haec iuris notitia ars appellari, quia finem habet mirabilem, licet aliae omnes artes fere infinitae sint, ut in proemio digestorum l. *sed quia*.

[Const. *Omnem* § 5. . . et, quod paene in alia nulla evenit arte, cum etsi vilissimae sint, omnes tamen infinitae sunt, haec sola scientia habeat finem mirabilem.] Vel dicitur ars, id est, artificium, nam auctor iuris est homo, ‘auctor iustitiae est deus, et secundum hoc ius et lex idem significant. licet autem largissime dicatur lex omne quod legitur, tamen specialiter significat sanctionem iustam, iubentem honesta, prohibentem contraria.’ Quandoque ponitur ius pro legis significatione,² et lex accipitur utpote oratio quae legitur et iuris est significativa. nomen rationis latius quam ista patet. nam et argumentum est ratio, non tamen ius. diciturque ratio³ quia affirmatur vel fit ratum.

‘Ius etiam quandoque supponitur pro iure naturali tantum, quod semper bonum et aequum est. quandoque pro iure civili tantum. quandoque pro iure praetorio tantum. quandoque pro eo tantum quod competit ex

¹ *profitemur* Gonv. Cai.; *profitentur* Sp. We have no warrant for the bracket. ² *Sic* Y; *significato* Sp. Pap. Ven. Gonv. Cai.

³ *dicitur quod ratio* and with no stop before *dicitur* Sp.; our text from Gonv. Cai.

‘quandoque pro obligatione qualibet, quandoque pro hereditate,’ sicut pro proprietate rei, ‘quandoque pro bonorum possessione, quandoque pro potestate, ut cum dicitur *Iste est sui iuris*, quandoque pro rigore iuris, ut ‘cum dividitur inter ius et acquitatem.’ ‘Item ponitur pro ipsa arte, non pro quolibet iure quod invenitur in ipsa arte. nec enim omne ius praecipit, immo quoddam permittit. vel ponitur pro omni iure’ ‘quod praecipit honeste vivere, alterum non laedere, ius suum cuique tribuere.’

{¹ Quia est ius proprietatis et ius possessionis. item ius possessionis sicut feodum, et unde locum habet assisa mortis antecessoris. item ius possessionis sicut liberum tenementum, si quis tenuerit tantum ad vitam² quacunque ratione. item ius proprietatis quod dicitur ius merum. et unde poterit quis habere utrumque. et dividi poterit quandoque ius proprietatis a iure possessionis. quia proprietas statim post mortem antecessoris descendit heredi propinquiore, minori et maiori, masculo et feminae, furioso et stulto sicut³ fatuo, surdo et muto,⁴ praesenti et absenti, et ignorantia sicut scienti. sed tamen non statim acquiritur talibus possessio, licet possessio et ius possessionis semper sequi debeat proprietatem. Ius autem possessionis descendere poterit per se ad alias personas et per alios gradus, ut, si cum⁵ ius proprietatis descendat ad antenatum⁶ propinquiorem, postnatus⁷ frater ponat se in seisinam, et sic moriatur seisitus, transmittit⁸ ad heredes suos quoddam ius proprietatis cum iure possessionis, quod sequi debeat primam proprietatem. et sic de herede in heredem. sed primi heredes maius ius habent quam secundi heredes. sed semper praeferrri debet possessio

¹ This is a gloss suggested by the remark that *ius* sometimes stands for *ius proprietatis*, sometimes for *bonorum possessio*. In the Vulgate text it has intruded itself into the middle of the preceding paragraph. In some MSS., e.g. Corb. P.B. Sh. St. Ha., it does not occur at all. In Dig. it is marginal. In other MSS. it is marked as an *addicio*, e.g. in Ed.; in Reg. it is marked as *plus*. In others it comes in at the end, in others in the middle, of the paragraph which here precedes it.

² Omit *ad vitam* Dig. ³ *et*, not *sicut*, Ed. ⁴ Omit *surdo et muto* Ed.

⁵ So Ed. Vulg.; *sicut* Dig.

⁶ *Sic* Dig. Ed; *agnatum* Vulg.

⁷ *primo natus* Vulg. nonsensically.

⁸ *transvertit* Vulg.

‘sententia. praetor enim ius dicitur reddere, etiam cum ‘iniquè decernit, relatione facta non ad id quod praetor ‘fecit, sed ad illud quod praetorem facere convenit.’ nam si non haberetur respectus ad id quod debuit fieri, non iniquum ius, sed aequum, dicitur reddidisse. ‘Quandoque ‘supponit pro loco in quo redditur ius,’ appellatione tracta ab eo quod fit in eo ubi fit, id est, fieri solitum est, salva maiestate imperii et salvo iure maiorum iudicantis.¹ ‘Supponit etiam quandoque pro necessitudine, veluti, *Est mihi ‘ius cognationis vel affinitatis*, ut ff. e. l. ul. et penul.

[D. 1. 1. 11. Ius pluribus modis dicitur : uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile. nec minus ius recte appellatur in civitate nostra ius honorarium. praetor quoque ius reddere dicitur, etiam cum iniquè decernit, relatione scilicet facta, non ad id quod ita praetor fecit, sed ad illud quod praetorem facere convenit. alia significatione ius dicitur locus in quo ius redditur, appellatione collata ab eo quod fit in eo ubi fit. quem locum determinare hoc modo possumus : ubicumque praetor salva maiestate imperii sui salvoque more maiorum ius dicere constituit, is locus recte ius appellatur.

D. 1. 1. 12. Nonnumquam ius etiam pro necessitudine dicimus, veluti est mihi ius cognationis et affinitatis.]

sed et Iob² dicit *necessarii mei veniunt ad me*. ‘Supponit ‘etiam quandoque ius pro actione, quandoque pro obligatione qualibet, quandoque pro hereditate, quandoque pro ‘bonorum possessione,’ sicut ex definitione cuiuslibet istorum licet considerare in suis rubricis.³ Sed et ius etiam in vulgari ponitur pro quodam cibo delicato. ‘Quandoque ‘ponitur pro potestate, ut dicitur *Iste sui iuris est*. et

¹ A better reading has not been found ; it can be corrected by the following passage from the Digest.

² *Ioha.* Ven ; *Ioh.* Pap. The allusion seems to be to Job vi. 13 : ‘Necessarii quoque mei recesserunt a me.’

³ *Gonv.* ; *rescriptis* Sp.

donec primi heredes evicerint¹ ius suum. Et si tamen frater postnatus plures habuerit filios² et postnatus³ se ponat in seisinam, ita fieri debet de eo⁴ ut supra. et sic poterit ad plures diversos heredes descendere ius proprietatis in infinitum, ut cum plures ius habeant proprietatis, unus vel plures possunt habere ius maius.}

[I. 4. § 4.] 'Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia. [§ 5.] Aequitas autem est rerum convenientia quae in paribus causis paria desiderat iura et omnia bene coaequiparat. et dicitur aequitas quasi aequalitas et vertitur in rebus, id est, in dictis et factis hominum. Iustitia in mentibus iustorum quiescit. inde est, quod si velimus loqui proprie, dicemus iudicium aequum non iustum, et hominem iustum non aequum. abutentes tamen his appellationibus dicimus hominem aequum et iudicium iustum. Differt ergo multum iuris prudentia a iustitia. [f. 3 b] iuris enim prudentia agnoscit, et iustitia tribuit⁵ quod suum est. item iustitia virtus est, iuris prudentia scientia est. item iustitia quoddam summum bonum est, iuris prudentia medium. [§ 6.] Iuris praecepta sunt tria haec: honeste vivere, alterum non laedere, ius suum unicuique tribuere.'

[I. 5. § 1.] 'Infinite vero sunt iuris species, quia infiniti sunt homines et infinite sunt res, nam et⁶ sic diceretur ius aliud equinum, aliud asininum, aliud vineae aliud agri, aliud Petri aliud Johannis.'⁷

[I. 5. § 2.] 'Est autem ius publicum quod ad statum rei Romanae⁸ pertinet, et consistit in sacris in sacerdotibus et in magistratibus. Interest enim reipublicae ut habeat⁹ ecclesias in quibus homines petant veniam peccatorum suorum. Expedit enim esse sacerdotes, a quibus de peccatis nostris poenitentiam accipimus, et qui orent pro nobis et dei nobis adiutorium

¹ *verificaverint* Vulg. ² *filiis* Dig. ³ *primo natus* Vulg. nonsensically.

⁴ *de quolibet* Ed.; a good reading.

⁵ *Sic* Dig. Cr. Ed; insert *cuique* Vulg.

⁶ Omit *et* Vulg.

⁷ *Sic* Dig. Corb. Cr. Azo; *aliud pecoris aliud hominis* Ed. Vulg.

⁸ *Sic* Dig. Corb. Cr. Ed. St. Ha.; *reipublicae* Vulg. ⁹ *habeant* Dig. Cr.

‘ quandoque ponitur pro iuris rigore, ut cum dicitur *inter*¹
‘ *ius et aequitatem* ’ etc., ut C. *de legibus et con.* l. j.

[C. 1. 14. 1. Inter aequitatem iusque interpositam
interpretationem nobis solis et oportet et licet inspicere.]
‘ Iuris autem prudentia est divinarum et humanarum
‘ rerum notitia, iusti atque iniusti scientia,’ ut ff. e. l.
iustitia. § ult. [D. 1. 1. 10 § 2]. ‘ Aequitas autem est rerum
‘ convenientia quae in paribus causis paria iura desiderat
‘ et omnia bona coaequiparat. et dicitur aequitas quasi
‘ aequalitas et vertitur in rebus, id est, in dictis et in factis
‘ hominum. Iustitia in mentibus quiescit iustorum. inde
‘ est quod, si velimus loqui proprie,² dicimus iudicium aequum
‘ non iustum, et hominem iustum non aequum. abutentes
‘ tamen his appellationibus dicimus iudicem aequum et iu-
‘ dicium iustum. Differt ergo multum iuris prudentia a
‘ iustitia. siquidem iuris prudentia dignoscit, iustitia tribuit
‘ cuique ius suum. item iustitia virtus est, iuris prudentia
‘ scientia. item iustitia est quoddam summum bonum,
‘ iuris prudentia medium.’

‘ Iuris praecepta sunt tria : honeste vivere, alterum non
‘ laedere, suum cuique tribuere,’ ut infra e. § *iuris*, et ff.
e. l. *iusticia* [Inst. 1. 1. § 3. D. 1. 1. 10. § 1]. et est
notandum quod istud ultimum aliter accipitur quam in
definitione iustitiae. si quidem ibi complectitur haec tria,
hic autem illud solum quod extra duo prima praecepta
relinquitur. ‘ Item ponitur nomen iuris pro ipsa arte non
‘ pro quolibet iure quod invenitur in arte. nec enim omne
‘ ius praecipit immo quoddam permittit,’ ut. ff. *de legibus et*
se. con. l. *legis*.

[D. 1. 3. 7. Legis virtus haec est : imperare, vetare,
permittere, punire.]
‘ vel ponitur pro omni iure quod praecipit. nam omne
‘ quod praecipit, vel praecipit honeste vivere, vel alterum
‘ non laedere, vel suum cuique tribuere.’

Huius studii duae sunt positiones, publicum et privatum.
Quod quidam sic exponunt : id est, huius iuris per studium

¹ *interest* Sp.

² Omit *proprie* Sp. Pap. Ven. Y. Gonv. Cai. ; it is supplied from Bracton.

‘adquirant et providentiam. Expedit etiam magistratus
 ‘reipublicae constitui, quia per eos qui iuri dicendo prae-
 ‘sunt effectus rei accipitur: parum est enim ius in
 ‘civitate esse nisi sint qui possint iura regere.’¹

[I. 5. § 3.] ‘Ius autem privatum est quod ad singulorum
 ‘pertinet utilitatem principaliter, et secundo pertinet ad
 ‘reipublicam, unde dicitur:—Expedit quidem² reipublicae
 ‘ne quis re sua male utatur. Et sic vice versa quod
 ‘reipublicae principaliter interest quod sic secundo³
 ‘respiciat utilitatem singulorum. Est etiam’ huiusmodi
 ‘ius privatum tripertite collectum aut ex naturalibus
 ‘praeceptis aut gentium aut civilibus.’

NOTES.

Bracton enters on a section of his book which is to correspond with the first title of the Institutes (*de iustitia et iure*). But at the outset he feels constrained to depart from the foot-steps of his guide. The Roman lawyers have put in the forefront of their work a discussion of the word *ius* and the related words *iustitia* and *iurisprudentia*. But one who is going to write, albeit in Latin, of English law, cannot give this prominence to *ius*. This word has fallen into the background. It has failed to secure a place in the new Romance languages. In England it is attacked by the powerful alliance between the English *laghu*, *lagh*, *law*, and the French *lei* which comes from the Latin *legem*. The Latin *lex* or its plural *leges* was commonly used by Englishmen in the sense in which we now use *law* when we speak of English law or French law. English law is *lex et consuetudo* (or *leges et consuetudines*) *Angliae*. Glanvill and Bracton do not write *De iure Anglicano*; they write *De legibus* (or *De legibus et consuetudinibus*) *Angliae*. Thus Bracton cannot allow to *ius* that prominent place which it enjoys in the Institutes. The first two words that must be defined are *lex* and *consuetudo*. For a definition of a *lex* he goes to the Digest itself (D. 1. 3. 1), whence he obtains: ‘Lex est communo praeceptum, virorum prudentium consultum, delictorum quae sponte vel ignorantia contrahuntur coercitio, communis reipublicae sponsio.’ By regarding the judges as the *viri prudentes* and introducing a theory of tacit consent one can make this do, even for unenacted English law. There follows a remark that is extracted

¹ *gerere* Dig. Cr. Vulg.; *regere* Ed. Azo and Digest.

² *enim* Cr. Ed.

³ *interest, secundo puto quod* Azo.

discendi vel adipiscendi duae sunt species. species enim dicuntur positiones quia sub genere ponuntur et assignantur, vel quia posita specie ponitur et genus, sed non e converso. Vel sic : duae sunt positiones, id est, super duobus ponitur ars ista studio discenda, super iure publico et privato. Nec enim prima expositio placet quod ex diversitate rerum vel personarum super quibus ius ponatur diversae eius species ponantur vel videantur. hac enim ratione ‘ infinitae ’ essent ‘ species iuris, quia infiniti sunt homines et infinitae sunt ‘ res. nam et sic diceretur ius aliud equinum, aliud asininum, ‘ aliud vineae, aliud agri, aliud Petri aliud Iohannis.’

‘ Est autem ius publicum quod ad statum rei Romanae ‘ pertinet, et consistit in sacris, in sacerdotibus et magis- ‘ tratibus,’ ut in. e. § ul. et ff. e. l. j. § *huius studii*. [Inst. 1. 1. § 4.; D. 1. 1. 1. § 2.] ‘ Interest enim rei publicae ‘ ut habeat ecclesias in quibus homines petant veniam ‘ suorum peccatorum,’ ut in aut. *ut lice. ma. et a.* § *quia vero ita*.

[Auth. Const. 113. 15. § 1. Quia vero ita com-
periuntur aliqui impii, ut etiam in venerandis domibus
praesumant in talibus se miscere sceleribus, et ibi de
peccatis tractare ubi consueverunt deum timentes pec-
catorum veniam postulare . . .]

‘ Expedi etiam rei publicae magistratus constitui, quia
‘ per eos qui iuri dicendo praesunt effectus rei accipitur :
‘ quantum¹ est enim ius in civitate esse nisi sint qui possint
‘ iura regere,’ ut ff. *de orig. iur.* l. ij. § *post originem*.

[D. 1. 2. 2. § 13. . . . quia, ut exposuimus, per eos qui
iuri dicundo praesunt effectus rei accipitur : quantum
est enim ius in civitate esse, nisi sint qui iura regere
possint ?]

‘ Expedi etiam esse sacerdotes, a quibus de peccatis
‘ nostris accipiamus poenitentiam, et qui orent pro nobis et
‘ dei nobis acquirant providentiam,’ ut C. *de summa trini.*
l. ul. [C. 1. 1. 8].

‘ Ius autem privatum est quod ad singulorum pertinet
‘ utilitatem,’ ‘ subaudi principaliter, secundo tamen et

¹ *quarum* Sp; *quantum* Pap. Gouv. Cai.; *parum* Ven.

from Azo's commentary on the title that is open before us: *lex* and *ius* may sometimes be used as synonyms; in a wide sense *lex* is all that can be read (*legitur*); in a narrower sense it is 'sanctio iusta iubens honesta et prohibens contraria.' Bracton's phrase about the force of custom seems to come straight from C. 8. 52. 2: 'Consuetudinis ususque longaevi non vilis auctoritas est.' *Lex* and *consuetudo* being disposed of, Bracton can begin to follow Azo through the first title.

The account of *iustitia* (p. 21) is a mosaic of Azonian sentences, which are strung together without being thoroughly understood. Azo suggests various expositions of the first sentence of the Institutes: 'Iustitia est constans et perpetua voluntas ius suum cuique tribuens.' You may, if you please, take the *suum* to refer to *iustitia*:—Justice is the constant and perpetual will of rendering to everyone *her* own, *i.e.* what belongs to justice. Bracton does not seem to see that the various suggestions are alternative. Only at one point does he amplify Azo's text: namely, where he illustrates the statement that *constancy* is always eulogistically used, by citing the texts *Constantes estote* and *O constantia martyrum*. Bracton seems to be citing the New Testament by memory. In Acta Apost. c. 23, v. 11, we find 'Constans esto;' in Paul. ad Cor. I. c. 15, v. 58, 'Stabiles estote.' The 'O constantia martyrum' is the beginning of a hymn written by Robert king of the French; about it chroniclers tell an amusing tale: his wife, Constantia, thought that he was singing her praises. (See Bouquet, *Recueil*, vol. x. pp. 292, 299, 314.) Azo, again, seems to have quoted (p. 26) the book of Job; some of his transcribers have been puzzled, for *Job* was often used as the sigle of Azo's master Johannes Bassianus.

The account of *ius* (p. 23) is copied from Azo, who, in his turn, has done little more than copy from the Digest. The last sentences of Bracton's paragraph are found in Azo's text, but are there separated from the general account of *ius* by the discussion of *iurisprudentia*. Azo has pointed out a difficulty which does not trouble Bracton, probably because he does not perceive it. It is this:—Justice, we are told, is the will to render to everyone his due. But then come the three famous *praecepta iuris*, and we see that 'ius suum cuique tribuere' is not the only requirement of *ius*; it adds 'honeste vivere, alterum non laedere.' Azo has to explain this. Also, he has to note that the enunciation of the three precepts cannot be the whole work that *ius* does, for *ius* is not always preceptive, sometimes it is permissive. Thus the word has wider and narrower meanings.

Over against the discussion of the various senses of *ius* we find in the Digby MS. a radically un-Roman gloss, which in other MSS. has made its way into the text (see above, p. 25). It expounds the English doctrine of the relativity of ownership. Every seisin begets a *ius*, and from this it follows that we may have at one and the same time many men with rights of ownership in one thing: *C* has a right; *B* has a

‘ad rem publicam pertinet, unde et dicitur:—Expedi rei publicae ne quis re sua male utatur,’ ut in. *de his qui sui vel ali. iu. sunt* § ult. [Inst. 1. 8. § 2]. ‘sic et quod rei publicae principaliter interest secundario puto quod respiciat utilitatem singulorum.’

‘Est autem ius,’ maxime ‘privatum, tripartite collectum. est enim ex naturalibus¹ praeceptis aut gentium aut civilibus.’² maxime ideo dixi, quia et ius publicum iure gentium est stabilitum, nam erga deum³ vel ecclesiam vel sacerdotem religio est de iure gentium, ut ff. e. l. j. § ul. et l. ij. [D. 1. 1. 1. § 4; D. 1. 1. 2], quod ius publicum supra appellavi, et ex hoc patet etiam quod publicum et privatum non sunt species iuris, sed et assignantur res vel personae super quibus posita sunt iura. ‘Quid autem sit ius naturale vel gentium vel civile et cui et quando per consuetudinem vel constitutionem principis derogetur in sequenti titulo assignatur.’

De iure naturali, gentium et civili [Inst. 1. 2].

‘Ius autem naturale pluribus modis dicitur. Primus est ut dicatur a natura animati motus quidam instinctu⁴ naturae proveniens, quo singula animalia ad aliquid faciendum inducuntur. unde dicitur, ius naturale est quod natura, id est, ipse deus, docuit omnia animalia. et ita istud nomen quod erit accusativi casus, et hoc nomen natura erit casus nominativi. vel dic quod nomen istud quod sit casus nominativi, ut sic dicat, quod docuit omnia animalia natura, id est, per instinctum naturae, et ita hoc nomen natura erit casus ablativi,’ ut in. e. in principio [Inst. 1. 2. pr.]. ‘et hoc est quod dicitur, primi motus non sunt in nostra potestate, secundi vero sunt. et ideo si res procedat in oblectamentum, id est, delectationem,

¹ *generalibus*, Sp. Pap. Ven.; *naturalibus* Z. Gonv. Cai.

² D. 1. 1. 1 § 2: ‘Privatum ius tripartitum est. collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.’ But the Bracton MSS. generally have *tripertite collectum*.

³ *domini* (in compend.) Sp.; *domini* Pap.; *deum* Ven. Gonv. Cai.

⁴ *quidam in distinctu* Sp.; *quidam instinctu* Pap. Ven. Y. Z. Gonv.; *instigtu* Cai.

better, because an older, right; *A* has a yet better, because a yet older, right. A very similar passage occurs near the end of Bracton's book (f. 434 b, 435) in a more appropriate context, and we have no reason to doubt that the gloss is Bracton's own.

Turning to the distinction between public and private law, Bracton seems to be guilty of a curious blunder. Azo (see above, pp. 28, 30) has before him the famous words in which Ulpian draws the line between *ius publicum* and *ius privatum*. What, he asks, is the basis of this distinction? It cannot arise out of a classification of the various persons or the various things with which law has to deal, for, those things and those persons being infinite in number, we should thus have an infinite number of different kinds of law (*ius*). We should have not merely public law and private law, but also equine law and asinine law, Petrine law and Johannine law. Now, Bracton, to all appearance, adopts this *reductio ad absurdum* as sound doctrine, or rather he quite misses the point of Azo's argument. Some of his copyists make matters worse by writing *aliud pecoris aliud hominis* instead of *aliud Petri aliud Johannis*.

[*De iure naturali, gentium et civili.*]

‘Dictum est supra de iure publico et privato, nunc [f. 3 b]
 ‘autem dicendum quid sit ius naturale, vel gentium, vel
 ‘civile,’ quod dici poterit consuetudo quandoque. ‘et cui
 ‘et quando¹ per consuetudinem vel constitutionem prin-
 ‘cipis derogetur,² in sequentibus dicendum est.’³

[I. 5. § 4.] ‘Ius autem naturale pluribus modis dicitur.
 ‘Primus⁴ est ut dicatur a natura animati motus quidam in-
 ‘stinctus⁵ proveniens, quo singula animalia ad aliquid facien-
 ‘dum inducuntur, et unde dicitur sic:—Ius naturale est
 ‘quod natura, id est, ipse deus, docuit omnia animalia. et
 ‘ita est istud nomen *quod* accusativi casus, et hoc nomen
 ‘*natura* erit casus nominativi. vel dici poterit quod
 ‘nomen illud *quod* sit nominativi casus, ut dicatur sic,
 videlicet:—Ius naturale, quod docuit omnia animalia

¹ *quandoque*. *Et cui et quando* Vulg. Apparently there should be a stop after *quandoque*. Bracton holds that sometimes (*quandoque*) the term *ius civile* is equivalent to *consuetudo*.

² *Sic* Dig. Cr. Ed.; insert *legi* Vulg.

³ Omit *est* Dig.

⁴ Insert *modus* Vulg. ⁵ *Sic* Dig. Corb. Cr. Ed.; *institutus* Vulg.!

‘veniale tantum contrahitur peccatum, nisi progrediatur
 ‘ad aliquid componendum, ut exerceat quod turpiter cogi-
 ‘tavit. et tunc dicetur tertius motus mortale contrahere
 ‘peccatum.¹ Et est illud notandum quod qua ratione
 ‘iustitia est voluntas etc. habito respectu ad rationalia
 ‘tantum, eadem dicitur ius naturale motus,’ ut dixi,
 ‘habito respectu ad omnem creaturam rationalem vel
 ‘irrationalem. Dicunt autem quidam quod neque voluntas
 ‘neque motus ius naturale vel gentium dici possunt, quia
 ‘facti sunt, voluntas tamen vel motus instrumenta, per
 ‘quae ius naturale vel iustitia aperiunt vel ostendunt suum
 ‘effectum: in anima enim sunt virtutes et iura.² Illud
 ‘apertius forte dicetur, ius naturale esse debitum quoddam
 ‘quod natura cuilibet repraesentat.’ Dicitur etiam quando-
 que ius naturale ius commune³ hominum industria sta-
 tutum, et ita ius gentium potest dici ius naturale, ut in. *de*
rerum divisione § *singulorum*.

[Inst. 2. 1. 11. Singulorum autem hominum multis
 modis res fiunt: quarundam enim rerum dominium
 nanciscimur iure naturali, quod, sicut diximus, ap-
 pellatur ius gentium, quarundam iure civili.]

Item dicitur ius naturale quod in lege mosaica vel in
 evangelio continetur, ut legitur in decretis. ‘Item dicitur
 ‘ius naturale ius aequissimum, ut cum dicitur lapsos
 ‘minores secundum aequitatem restituui,’ ut ff. *de mino*. l. i.
 in prin.

[D. 4. 4. 1 pr. Hoc edictum praetor naturalem
 aequitatem secutus proposuit, quo tutelam minorum
 suscepit.]

Est tamen etiam⁴ ius naturale quod tuetur pacta, ut ff. *de*
pact. l. i. in prin.

[D. 2. 14. 1 pr. Huius edicti aequitas naturalis
 est. quid enim tam congruum fidei humanae, quam
 ea, quae inter eos placuerunt, servare?]

et in hac significatione ius naturale potest dici civile.
 Prima autem definitio data est secundum motus sen-

¹ Sp. Pap. Ven. Y. Gonv. Cai.

² iura Sp. Gonv.; vitia Cai.

³ *communi* Gonv. Cai.

⁴ Pap. Ven.; contra Sp. Cai.; circa Gonv.

‘ natura, id est per instinctum naturae, et ita hoc nomen
 ‘ *natura* erit casus ablativi. et hoc est quod dicitur, primi
 ‘ motus non sunt in nostra potestate, secundi vero sunt.
 ‘ et ideo si res procedat in delectationem et oblectamentum
 ‘ tantum et non ulterius, veniale tantum contrahitur pecca-
 ‘ tum. si autem ulterius progrediatur ad aliquid componen-
 ‘ dum, ut exerceat quis quod turpiter cogitavit, tunc
 ‘ dicetur tertius motus et mortale contrahere peccatum.
 ‘ Est et illud notandum, quod qua ratione iustitia est [L. 4]
 ‘ voluntas, habito respectu ad rationalia¹ tantum, eadem
 ‘ ratione dicitur ius naturale motus, habito respectu ad
 ‘ omnem creaturam rationalem vel irrationalem. Sunt
 ‘ tamen quidam qui dicunt quod² neque voluntas neque
 ‘ motus ius naturale vel gentium dici possunt, quia facti
 ‘ sunt, voluntas tamen vel motus sunt instrumenta per
 ‘ quae ius naturale vel iustitia aperiunt vel ostendunt suum
 ‘ effectum : in anima enim sunt virtutes et iura. Et illud
 ‘ forte apertius dicitur, ius naturale³ esse debitum quod-
 ‘ dam quod natura cuilibet repraesentat.’ ‘ Item dicitur
 ‘ ius naturale ius aequissimum, cum dicitur lapsos minores
 ‘ secundum aequitatem restitui.’

[I. 5. § 5.] ‘ Ius autem civile,’ quod dici poterit ius
 consuetudinarium, ‘ pluribus modis ponitur. uno modo
 ‘ pro statuto cuiuslibet civitatis. alio modo dicitur ius
 ‘ civile id quod non est praetorium, et quandoque detrahit
 ‘ vel addit iuri naturali vel gentium,’ quia⁴ aliud ius
 quandoque in civitatibus ex consuetudine more utentium
 approbata, quam extra, cum⁵ observari debeat talis con-
 suetudo pro lege. ‘ Item appellari potest ius civile omne
 ‘ ius quo utitur civitas, sive sit naturale, sive civile, sive
 ‘ gentium ’ et huiusmodi.

[I. 5. § 6.] ‘ Ius autem gentium est quo gentes humanae
 ‘ utuntur, et quod a naturali iure recedit,⁶ eo quod ius

¹ *rationabilia* Vulg.

² Omit *dicunt quod* Dig. Corb. Ed.; these words are interlined in Cr.

³ *Sic* Dig. agreeing with Azo; *apertius dicitur. Ius autem naturale secundo modo dicitur debitum*, Vulg. An unintelligent emendation.

⁴ *Sic* Dig. Corb. Cr. Ed.; *gentium. Quaeritur* Vulg.!

⁵ *Sic* Dig. Ed.; *tamen* Cr. Vulg. ⁶ *Sic* Dig. Cr. Ed.; *procedit* Vulg.!

sualitatis, aliae autem assignatae sunt secundum motum rationis.

‘Ius autem civile’ ‘pluribus modis dicitur.¹ uno modo ‘ponitur pro statuto cuiuslibet civitatis.’ sed ubi non additur nomen civitatis ius civium Romanorum significamus, sicut cum poetam dicimus, nec addimus nomen, subaudiatur apud Graecos egregius Homerus apud Latinos² Vergilius, ut in. e. § *sed ius* [Inst. 1. 2. 2]. Alio modo dicitur ius civile lex xii. tabularum, ut probatur ff. *de iusticia et iur.* l. *ius civile* § *hoc igitur*.

[D. 1. 1. 6. § 1. Hoc igitur ius nostrum constat aut ex scripto aut sine scripto.]

Altero modo dicitur disputatio prudentium, ff. *de orig. iu.* l. ii. § *haec disputatio*.

[D. 1. 2. 2. § 5. Haec disputatio et hoc ius, quod sine scripto venit compositum a prudentibus, propria parte aliqua non appellatur . . . sed communi nomine appellatur ius civile.]

Quarto ‘modo dicitur ius civile id quod non est praetorium, et detrahit vel addit iuri naturali vel gentium,’ ut liquet in potestate servorum restricta et tutela inventa, ut ff. *de ius. et iu.* l. *ius civile*.

[D. 1. 1. 6 pr. Ius civile est quod neque in totum a naturali vel gentium recedit, nec per omnia ei servit. itaque cum aliquid addimus vel detrahimus iuri communi, ius proprium, id est civile, efficimus.]
et in. *de his qui sui vel ali. iu. sunt* [Inst. 1. 8] et *de tutel.* in prin. [Inst. 1. 13]. et sic dicitur : Iste succedit de iure civili, ille de iure praetorio, ut in. *de exher.* l. i. § *emancipatos*.

[Inst. 2. 13. 3. Emancipatos liberos iure civili neque heredes instituere neque exheredare necesse est : . . . sed praetor omnes . . . si heredes non instituantur exheredari iubet.]

Ius autem civile iuvatur, suppletur, corrigitur per praetorium, ut ff. *de iusti. et iu.* l. *ius autem civile* § 1.

¹ ponitur Gonv. Cai.

² apud nos Gonv. Cai.

‘ naturale omnibus animalibus commune sit, quae in terra,
 ‘ quae in mari nascuntur, et quae in aere. [§ 7.] A iure
 ‘ enim gentium descendit maris et feminae coniunctio, et
 ‘ fit per mutuam utriusque voluntatem, quae matrimonium
 ‘ appellatur. corporalis tamen coniunctio factum¹ est, nec
 ‘ proprie dici poterit ius, cum ipsum sit corporale et
 ‘ videatur. iura autem omnia sunt incorporalia et videri
 ‘ non possunt.² Ab eo tamen iure descendit liberorum
 ‘ procreatio et educatio.³ Hoc autem ius gentium solum
 ‘ hominibus commune est, veluti erga deum religio, ut
 ‘ parentibus et patriae pareamus, ut vim atque iniuriam
 ‘ propulsemus: nam⁴ iure hoc evenit ut quod quis⁵ ob
 ‘ tutelam sui corporis fecerit, iure fecisse aestimetur. item
 ‘ cum inter homines cognationem quandam constituit
 ‘ natura, consequens est hominem homini insidiari nefas
 ‘ esse. [§ 8.] Manumissiones autem iuris gentium sunt.
 ‘ est autem manumissio datio libertatis, id est detectio,
 ‘ secundum quosdam, quia libertas, quae est de iure
 ‘ naturali, per ius gentium auferri non potuit, licet per ius
 ‘ gentium fuerit obfuscata. iura enim naturalia sunt
 ‘ immutabilia. sed dic⁶ vere quod libertatem dat qui
 ‘ manumittit, licet non suam’ sed ‘ alienam. dat enim quod
 ‘ non habet, sicut videtur in creditore, qui⁷ usum fructum
 ‘ constituit in re non⁸ sua. Iura enim naturalia dicuntur
 ‘ immutabilia, quia non possunt ex toto abrogari vel
 ‘ auferri, poterit tamen eis derogari vel detrahi in specie’
 ‘ vel in parte. ‘ Item ex hoc iure gentium introducta sunt
 ‘ bella, cum’ ad tuitionem patriae ‘ inducuntur⁹ a principe,
 ‘ vel propulsantur violentiae. Ex hoc etiam iure gentium
 ‘ discretas¹⁰ sunt gentes, regna condita et dominia distincta.

¹ Sic Dig. Ed.; *facta* Vulg.

² Here the Vulgate inserts *quae descendunt et introducta sunt ex iure gentium*. These words are the rubric of the paragraph.

³ Sic Dig. Corb. Cr. Ed.; add *id est nutrimentum* Vulg.

⁴ Insert *de* Vulg.

⁵ Sic Corb. Cr. Ed.; *ius* Dig.

⁶ Sic Dig. Corb. Ed. Azo; *dico* Cr.; *dicitur* Vulg.

⁷ The sense requires *et in eo qui*.

⁸ *non* must be omitted, if Azo's text is to be restored. Ch. has *constituit in tenemento suo*.

⁹ Sic Dig. Cr. Vulg.; *introducuntur* Ed.; *inducuntur* would be acceptable, and is given by Ch.

¹⁰ Sic Dig. Corb. Cr. Ed.; insert *id est separatae vel divisae* Vulg.

[D. 1. 1. 7. § 1. Ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia.]

et ita recipit in se quod facit¹ alii. Quinto modo 'ius civile potest appellari omne ius quo utitur civitas, sive sit 'naturale, sive civile, sive gentium,' et sic accipitur cum dicit² lex: Est enim res sanctissima civilis sapientia, ut ff. *de va. et extraor. co.* l. i. § *proinde*.

[D. 50. 13. 1. § 5. Proinde ne iuris quidem civilis professoribus ius dicent. est quidem res sanctissima civilis sapientia.]

Sexto modo dicitur ius civile quod ex legibus, plebiscitis, senatus consultis, principum decretis, auctoritate prudentium venit, ut ff. *de iusti. et iu.* l. *ius autem*. [D. 1. 1. 7 pr.]

'Ius autem gentium est quo gentes humanae utuntur, 'quod a naturali recedere facile intellegere licet, quia illud 'omnibus animalibus commune sit, quae in terra, quae in 'mari, quae in aere nascuntur. Ab eo descendit maris et 'feminae coniunctio, et fit per mutuam utriusque voluntatem, 'quam nos matrimonium appellamus. corporalis enim con- 'iunctio factum est.³ non potest dici ius, cum ipsum sit cor- 'porale et videatur. iura autem omnia sunt incorporalia. 'Ab eo etiam iure descendit liberorum procreatio et edu- 'catio. Hoc autem ius gentium solis hominibus commune 'est, veluti erga⁴ deum religio, ut parentibus et patriae 'pareamus, ut vim atque iniuriam propulsemus: nam iure 'hoc evenit ut quod quisque ob tutelam sui corporis fecerit, 'iure fecisse aestimetur. et cum inter nos cognationem 'quandam natura constituit, consequens est hominein 'homini insidiari nefas esse. Manumissiones etiam iuris 'gentium sunt. est autem manumissio datio libertatis, id 'est, detectio, ut dicunt quidam, quia libertas quae est de 'iure naturali non potuit auferri, licet fuerit obfuscata per 'ius' civile vel 'gentium. iura enim naturalia sunt 'immutabilia,' ut in. e. § penul. et ff. *de aequi. re. do.* l. *adeo* § *eum quis*.

¹ facit Gonv.: fecerunt Cai.

³ Gonv. Cai.: omit factum est Sp.

² dicit Gonv.: dicitur Sp.

⁴ ergo, Sp.

‘ Et non sunt dominia de novo inventa de iure gentium, sed ab antiquo, quia in veteri testamento aliquid erat meum et aliquid tuum,¹ et unde tunc erat prohibitum ne fieret furtum, et etiam tunc praeceptum² ne quis mercenarii sui retineret mercedem. Ex hoc etiam iure gentium, [f. 4 b] agris sunt termini positi, aedificia sunt collata et vicinata, ex qua collatione fiunt civitates,’ burgi et villae: et generaliter ius gentium se habet ad ‘ omnes contractus,’ et ad alia plura. Quae autem sit longa consuetudo dicetur infra.

NOTES.

Bracton copies his account of *ius naturale* from Azo (see above, pp. 32-3) without adding anything or omitting much. Still what he omits is sufficient to show that he has not come in sight of those problems which Azo had to face when he endeavoured to give a precise meaning to the term *ius naturale*. Azo has to observe that upon occasion *ius naturale* and *ius gentium* seem to be used as equivalent terms. He also thinks that *ius civile* may sometimes, and in a certain sense, be *ius naturale*. Bracton is not troubled by these difficulties.

A student of medieval psychology might have much to say about what follows: to him we must leave it. When Azo says that the Mosaic law and the Gospels contain *ius naturale*, and refers us to the Decretum, he is sending us more particularly to the first words of Gratian's work.

A meagre section about *ius civile* represents a learned disquisition in which Azo distinguishes six different meanings of the term. Bracton rejects a great deal of this as useless. What has he to do with the Twelve Tables? But further, he perverts the whole passage by giving to *civitas* the sense that it would have in an English charter. A *civitas* is a city: *ius civile* is the law of a city; therefore it is *ius consuetudinarium*, a city custom. For Bracton a *civitas* is not a state, it is a town; the custom of Norwich would be *ius civile*.

Azo's remark (p. 38) that ‘ ius civile recipit in se quod facit alii ’ means this: the *ius civile* has detracted from, has overruled, the *ius gentium*, and now comes the *ius praetorium* and detracts from or overrules the *ius civile*. The biter is bit.

Passing to the *ius gentium*, Bracton (p. 35) copies what Azo writes (p. 38), and makes but few omissions. His last words, however, serve

¹ Sic Dig. Vulg. Azo; *aliud*. . . . *aliud*. . . . Corb. Cr. Ed.

² Insert *fuit* Vulg.

[Inst. 1. 2. 11. Sed naturalia quidem iura . . . semper firma atque immutabilia permanent.

D. 41. 1. 7. § 7. . . . Videntur tamen mihi recte quidam dixisse, non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt: cum enim grana quae spicis continentur perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit.]

‘Vel dic, vere dat libertatem ille qui manumittit licet ‘non suam’ vel ¹ ‘alienam. dat enim quod non habet, sicut ‘in creditore et in eo qui constituit usum fructum in re sua,’ ut ff. *de usuf.* l. *quod nostrum* et in. *quibus ali. li.* in prin.

[D. 7. 1. 63. Quod nostrum non est transferemus ad alios: veluti is qui fundum habet, quamquam usum fructum non habeat, tamen usum fructum cedere potest.

Inst. 2. 8. pr. Accidit aliquando ut qui dominus sit alienare non possit, et contra qui dominus non sit alienandae rei potestatem habeat. . . . Contra autem creditor pignus ex pactione, quamvis eius ea res non sit, alienare potest.]

‘Iura enim naturalia dicuntur immutabilia quia nec ‘possunt ex toto abrogari vel auferri, sed tamen potest eis ‘derogari vel detrahi in specie,’ ut ff. *de iusti. et iu.* l. *ius civile* [D. 1. 1. 6]. Coeperunt autem istae manumissiones a iure gentium: nam cum iure naturali omnes homines liberi nascerentur nec erat nota manumissio, cum servitus esset incognita, sed postea quando iure gentium servitus invasit, secutum est beneficium manumissionis: et cum uno naturali nomine homines appellarentur, iure gentium tria genera hominum coeperunt esse, liberi, et ex his contrarium servi, et tertium genus liberti, id est, qui desierant esse servi. ‘Item ex hoc iure gentium introducta sunt bella, ut ‘cum indicuntur ² a principe’ vel a populo Romano ‘vel ‘propulsatur violentia,’ ‘discretae sunt gentes, regna condita, dominia distincta,’ scilicet, directa ab utilibus, et e

¹ vel Sp. Pap. Ven. Y. Z. Cai.; sed Bas.

² inducuntur Sp. Pap. Ven. Y. Gonv.; indicuntur Z. Cai. Bas.

to show that a good deal of Azo's learning passes over his head:—‘et generaliter ius gentium se habet ad *omnes* contractus.’ Azo of course knows and says that some kinds of contract are introduced by the *ius civile*.

A further charge must be brought against Bracton, as his text stands. Azo remarks (p. 40) that in the case of manumission a man gives what does not belong to him. If I give freedom to a slave, I do not give *my* freedom to him. He adds that there are other cases in which a person gives what he has not got. When an owner gives a usufruct, he gives what he has not got. So when the *creditor* alienates the *pignus*; he confers ownership on another, though he himself is not the owner. Bracton seems to have mixed up these two cases. Azo says: ‘Sicut videtur in creditore et in eo qui usum fructum constituit in re sua.’ Bracton seems to have omitted the *et in eo*, and inserted a *non* before *sua*.

converso. ‘Non dico quod dominia sint inventa de iure
 ‘gentium de novo, quia et veteri testamento aliquid erat
 ‘meum, aliquid tuum, unde et prohibebatur fieri furtum,
 ‘et praecipiebatur ne retineret mercedem mercenarii sui.¹
 ‘Ex hoc iure gentium agris termini sunt positi, aedificia
 ‘sunt collata vel vicinata, ex qua collatione fit civitas,’
 commercium est inductum, quod generale est nomen² ad
 ‘omnes contractus,’ obligationes sunt inductae quae alias
 dicuntur naturales, id est, iure³ gentium, nam, ut supra
 diximus, ius gentium quandoque dicitur naturale. quidam
 tamen contractus inducti sunt a iure civili, ut ff. e. 1. § *ex*
hoc.

[D. 1. 1. 5. Ex hoc iure gentium . . . emptiones,
 venditiones, locationes conductiones, obligationes
 institutae, exceptis quibusdam quae iure civili
 introductae sunt.]

ut obligationes litterarum et stipulationis et emphiteosis
 ut in. *de lit. obli.* et *de locatione* § *adeo* et *de act.* § *de pecunia*
 [Inst. 3. 21 ; Inst. 3. 24. § 3 ; Inst. 4. 6. § 9]. Cui autem iuri
 et quando per constitutionem principis vel consuetudinem
 derogetur, quia de hoc tangitur in. e. § *sed quod princepi*
 § *ex non scripto* [Inst. 1. 2. § 6 ; Inst. 1. 2. § 9], dic breviter
 ut notavi in C. *si contra ius vel uti. pu. r. sit in pe.*⁴ et C.
quae sit longa consuetudo.

[Summa Azonis C. 1. 22. et C. 8. 52.]

De iure personarum [Inst. 1. 3].

‘Dictum est supra de iure naturali, gentium et civili,
 ‘sed quia omne ius quo utimur pertinet ad personas, vel
 ‘ad res, vel ad⁵ actiones, digniores autem sunt personae,
 ‘quarum causa statuta sunt omnia iura, de personis primo
 ‘videamus,’ ut supra ti. prox. § *ul.* [Inst. 1. 2. § 12], id est, de
 ‘iure quod vertitur circa personas’ vel de statu personarum,
 ‘quamvis sit varius et discretus. Est ergo notanda summa

¹ *retinere*. . . . *tui* Gonv.

² Omit *nomen* Cai.

³ *iuris* Cai.

⁴ Corr. *Si contra ius vel utilitatem publicam etc. fuerit aliquod postulatum vel impetratum.*

⁵ Omit *ad* Sp. Bas.

[*De iure personarum.*]

[I. 6. § 1.] ‘Dictum est supra de iure naturali, gentium [f. 4b]
‘et civili, sed quia omne ius de quo tractare proponimus¹
‘pertinet vel ad personas, vel ad res, vel ad actiones’
secundum leges et consuetudines Anglicanas, ‘et cum digni-
‘ores sint personae, quarum causa statuta sunt omnia iura,
‘ideo de personis primo videamus et earum statu, qui varius
‘est et diversus, et’ postmodum ‘de iure personarum quod
‘vertitur circa eas. Est autem prima divisio personarum
‘hac’ et brevissima, ‘quod omnes homines aut liberi sunt

¹ *proposuimus* Vulg.

‘divisio personarum’ ‘quod omnes homines aut liberi sunt aut servi, id est, omnis homo aut est liber aut servus, ut ‘ita pluralis oratio resolvatur in singularem,’ ut ff. *de condic.* et l. *falsa demonstratio* § ul.

[D. 35. 1. 33. § 4. Quid ergo si quis ita scripserit *Stichum et Pamphilum Titio do lego si mei erunt cum moriar*, et unum ex his alienaverit, an vel alter possit a legatario vindicari? Placet vindicari, nam hunc sermonem, licet pluralis sit, pro eo oportet accipi, atque si separatim dixisset *Stichum si meus erit cum moriar*.]

ut ita vitetur oppositio de duobus assignatis, quorum unus est liber alter servus. ‘nec est oppositio de ascripticio, ‘quia vere liber est licet quodam servitio sit astrictus,’ ut C. *de episcopis et cle.* l. *iubemus* [C. 1. 3. 36] et Aut. *ascripticios*.

[Auth. *de sanct. episc.* § *ascripticios* (Const. 134. c. 17). Ascripticios in ipsis possessionibus in quibus sunt ascripti, clericos etiam praeter voluntatem dominorum fieri permittimus. ita tamen ut clerici facti impositam sibi agriculturam adimpleant, subrogato aliquo quem maluerint.]

‘Nec est oppositio de statuliberis,’ ¹ quia pendente conditione vere servus est,² ut ff. *de statuli.* l. *statuliberum*.

[D. 40. 7. 9. Statuliberum medio tempore servum heredis esse, nemo est qui ignorare debeat.]

‘Videndum ergo quid sit libertas, quid sit servitus et qualiter ‘contingat servitus,’ nam de ingenuitate qualiter contingat dicetur in proximo titulo. ‘Est autem libertas naturalis ‘facultas eius quod cuique facere libet nisi quod vi aut iure ‘prohibetur,’ ut ff. *de statu ho.* l. *iiij.* [D. 1. 5. 4.]. ‘et secundum hanc definitionem videtur quod servi sint liberi, ‘nam et ipsi liberam habeant facultatem nisi vi aut iure ‘prohibeantur.’ Et hoc Guarnerius³ admisit. Aut enim ‘definitur libertas eo iure quo prodita est.’ Alii dicunt in definitione addendum quod legitur in e., scilicet, ‘ex qua

¹⁻² Cai.; omit Sp. Bas.

³ Guancrius Sp.; Guarnerius in full Govv.

‘aut servi, id est, omnis homo aut est liber, aut est servus, ut ita resolvatur pluralis oratio¹ in singularem. sed² sic ‘opponi poterit de ascripticio, ut videtur,³ quia vere liber ‘est, licet quodam servitio sit astrictus.’ et de eo brevis poterit esse solutio, quia ei qui liber⁴ est villenagium vel servitium nihil detrahit libertatis,⁵ habita tamen distinctione, utrum tales sint villani et tenuerint in villano socagio de dominico domini regis, de quibus inferius tractabitur plenius. ‘item nec obstat, quod dicitur de statuliberis,’⁶ quia quamvis servus fuerit in possessione libertatis, revera servus est, quamvis se et sua aliquando defendere possit contra dominum suum, petentem ipsum ut nativum suum, per exceptionem privilegii. Cum autem omnis homo sit liber vel servus, ‘expedit videre quid sit libertas, et quid ‘servitus.’⁷

[I. 6. § 2.] ‘Est autem libertas naturalis facultas eius, ‘quod cuique facere libet, nisi quod iure aut vi prohibetur. ‘sed secundum hoc videtur quod servi sint liberi, nam et ‘ipsi liberam habent facultatem nisi vi aut iure prohibeantur.’ ‘Sed definitur libertas eo iure quo prodita est, ex ‘qua liberi vocantur. licet enim servi’ efficiantur ‘liberi,’⁸ tamen quoad⁹ ius gentium servi sunt, quoad ius vero naturale liberi, et ita liberi et servi, diversis tamen respectibus, et sic omnino liber et omnino servus et non pro parte, et secundum quod praedictum est. ‘Et in hac parte ius civile ‘vel¹⁰ gentium detrahit iuri naturali.’

[I. 6. § 3.] ‘Est quidem servitus constitutio iuris gentium qua quis dominio alieno contra naturam subicitur. ‘et dicitur a servando, non a serviendo. antiquitus enim ‘solent principes captivos vendere,¹¹ et ideo eos servare et ‘non occidere. Dici etiam poterunt mancipia eo quod ab ‘hostibus manucapiuntur.’ et ideo cum postmodum libertate donentur,¹² dicuntur manumitti, quasi a manu

¹ Sic Dig. Corb. Cr. Ed. Azo; *omnino* Vulg.

² *nec sic* would be acceptable.

³ Sic Dig. Cr. Ed.; *ut dicitur* Vulg.

⁴ *liber homo* Cr. Ed.

⁵ *libertati* Dig.

⁶ Sic Dig. Cr. Ed.; *libertatis* Vulg.

⁷ Sic Dig. Corb. Cr.; add *et qualiter contingat servitus* Ed. Vulg. Azo.

⁸ *servi sint liberi* Azo.

⁹ *tamen ad* Dig.

¹⁰ Omit *vel C*

¹¹ *vendere ducere* Cr. Ed.

¹² Sic Dig.; *libertati donantur* Vulg.

liberi vocantur. licet enim servi sint liberi,' non tamen liberi vocantur ex ea libertate.

[Inst. 1. 3. § 1. Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur.]

Vel melius ita expone, *ri* id est iure gentium, quia per violentias et necessitates est inductum, ut supra *ti*. proximo § *ius autem*:

[Inst. 1. 2. § 2. Ius autem gentium omni humano generi commune est. nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt. bella etenim orta sunt et captivitates secutae et servitutes quae sunt naturali iuri contrariae.]

et ex eo inducta est a principio servitus. aut *iure*, scilicet civili, cum homo liber patitur se vendi ut liquebit infra.¹ Nec enim placet prima expositio vel secunda quod servi sint liberi vel nascentur liberi de iure naturali, cum 'in hac parte ius civile vel gentium detraxerit iuri naturali,' et sic etiam liquebit ex definitione servitutis. 'Est autem servitus constitutio iuris gentium qua quis dominio alieno contra naturam subicitur. Appellati sunt a servando non a serviendo,' ut dicunt grammatici. 'principes enim captivos vendere iubent ac per hoc servare non occidere solent. ipsi etiam mancipia dicti sunt quia ab hostibus manucapiuntur,' ut in. e. § *servitus*, et ff. e. l. iij. § *servitus* [Inst. 1. 3. § 2; D. 1. 5. 4. § 1]. 'Tabellio autem, qui dicitur servus publicus, a serviendo derivari potest.' Igitur captivitate liberi homines fiunt servi de iure gentium ut dictum est.

Fit etiam homo liber servus de iure civili si maior est xx² annis et patitur se vendi, vel aliquo titulo in aliquem transferri ad pretium vel quodlibet lucrum participandum ignoranti condicionem suam. et est quartum necessarium quod pretium vere participet, ut ff. *de sta. ho.* l. v., et C. *de liberal. c.*³ l. *non ideo*, et l. *si ministerium*, et ff. *de lib. c.*

¹ Cai.; omit *infra* Sp.

² xxv. Cai.

³ *de liberis c.* Sp.

dimitti.¹ Sed tamen omnis servus non dicitur a servando, sed a serviendo, non enim omnis qui servit est servus, nec dicitur a servando, sicut videri poterit in tabellione. ‘tabellio enim qui dicitur servus publicus a serviendo derivatur.’

[I. 6. § 4.] ‘Servi autem aut nascuntur aut fiunt.’ Nascuntur autem ex nativo et ex² nativa alicuius copulatis vel solutis, sive sub potestate domini constituti sunt, sive extra potestatem. item nascitur³ servus qui ex nativa soluta generatur quamvis ex patre libero, quia sequitur condicionem matris quasi vulgo conceptus. item dicitur servus natione de libero genitus, qui se copulaverit villanae in villenagio constitutae, sive copula maritalis intervenerit sive non. item vice versa, si villanus ingrediatur ad liberam in liberum tenementum, partus proveniens erit servus. si autem ex nativo unius et ex nativa alterius, tunc refert in cuius villenagio, ut per hoc videatur cuius servus esse debeat, et quem debeat sequi partus, patrem videlicet, vel matrem, secundum quod copulati fuerint vel soluti, et secundum quod fuerint sub potestate dominorum vel extra. item si a libero et nativa soluta, partus erit nativus, quia sequetur condicionem matris, si extra villenagium. si autem ex nativa et libero extra villenagium copulatis et in libero toro, liber erit ac si de libera et libero: et ita nascuntur servi. Fiunt etiam servi liberi homines captivitate, de iure gentium, ut praedictum est: ‘bella enim orta sunt et captivitates secutae et cetera.’ Fit etiam liber homo servus per confessionem in curia regis factam: ut, cum liber homo sit, in curia domini⁴ regis⁵ se cognoscat ad villanum. ‘item fit⁶ liber homo⁷ servus, si, cum semel manumissus fuerit, ob ingratitudinem in servitudinem revocetur. item fit⁸ liber homo servus, cum ab initio clericus vel monachus fuerit effectus,⁹ postea ad secularem vitam redierit, quia talis debet restitui domino suo.’ ‘Item servorum una est condicio substantialis. quicumque enim servus est, ita est servus sicut alius, nec plus nec minus.’

¹ Sic Dig. Cr. Ed.; *manumissi . . . dimissi* Vulg.

² Omit *ex* Vulg.

³ *dicitur* Cr. Ed.

⁴ Omit *domini* Vulg.

⁵ Insert *et* Cr. and change the punctuation.

⁶ Omit *fit* Vulg.

⁷ Insert *sit* Vulg.

⁸ *sit* Vulg.

⁹ *factus fuerit* Vulg.

1. *liberis* § *si quis sciens*, et 1. *si usuf.* § i., et ff. *quibus ad lib. p. non licet* l. i.

[D. 1. 5. 5. § 1. Servi autem in dominium nostrum rediguntur aut iure civili aut gentium. iure civili, si quis se maior viginti annis ad pretium participandum venire passus est.

C. 7. 16 (*De liberali causa*). 5 et 16.

D. 40. 12. 7. § 2. Si quis sciens liberum emerit, non denegatur vendito in libertatem proclamatio adversus eum qui eum comparavit, cuiusque sit aetatis qui emptus est.

D. 40. 12. 23. § 1. In summa sciendum est, quae de venditis servis quibus denegatur ad libertatem proclamatio dicta sunt, etiam ad donatos et in dotem datos referri posse, item ad eos qui pignori se dari passi sunt.

D. 40. 13. 1. Maiores viginti annis ita demum ad libertatem proclamare non possunt si pretium ad ipsum qui venit pervenerit.]

Potest et quintum addi, quod is qui venditur sciat condicionem suam, ut ff. *quibus p. non li.* l. ul.

[D. 40. 13. 5. Si duo liberum hominem maiorem annis viginti emerimus, unus sciens eius condicionem alter ignorans, non propter eum qui scit ad libertatem ei proclamare permittitur, sed propter eum qui ignorat servus efficietur, sed non etiam eius qui scit, sed tantum alterius.]

Iste autem factus servus repetit ingenuitatem suam si pretium reddiderit et emptor sponte recipiat, nec enim cogitur, ut ff. *si libertus inge. di.* l. ii.

[D. 40. 14. 2. Qui se venire passus est maiorem, scilicet ut pretium ad ipsum perveniret, prohibendum de libertate contendere divus Hadrianus constituit: sed interdum ita contendendum permisit si pretium suum reddidisset.]

Alii dicunt satis esse si iste voluit reddere. Item de iure civili ‘fit servus qui ex ingratitudine revocatur in servitutem,’ et qui a patre venditur ob famem, et qui est de familia latronum

NOTES.

We come to the trenchant statement that all men are *liberi* or *servi*. Azo thinks good to tell us (p. 44) that this is equivalent to 'Every man is either *liber* or *servus*,' so that we may not read it to mean that either all men are free or else all men are serfs. This resolution of the *oratio pluralis* into the *oratio singularis* he justifies by a passage from the Digest, in which Marcianus construes a bequest of two slaves, Stichus and Pamphilus, 'if they are mine when I die,' as equivalent to a bequest of Stichus if he is mine when I die, and of Pamphilus if he is mine when I die. One must have 'authority' for everything.

Azo next has to meet the difficulty occasioned by the existence of *ascripticii* and of *statuliberi*. Are they slaves or are they free? He decides that the *ascripticius* is truly a free man, relying on a text which tells him that the *ascripticius* may, without the consent of his *dominus*, become a cleric. As to the *statuliber*, indubitably he is a *servus* until the condition has been performed, upon the performance of which he will gain his liberty.

Braeton tries to follow Azo, and his adoption of the Roman dilemma 'aut liberi aut servi' is of the utmost importance. He holds that the English *villanus* is a *servus*, and before the end of this chapter he says that every *servus* is as much a *servus* as is any other *servus*. He then repeats Azo's remark that the case of the *ascripticii* and the case of the *statuliberi* do not contradict the general doctrine. But he either wilfully perverts or (and this seems more probable) utterly misunderstands the technical terms that Azo has used. For Braeton the *ascripticius* is not a man who is tied to the soil, but the sokeman on the ancient demesne of the crown, who, though he does villain services, cannot be ejected from his tenement so long as those services are duly performed. Such an one is *glebac ascriptus*, because, though he may quit the tenement if he pleases, his lord cannot sever him from the soil against his will. Then, again, the *statuliber* is for Braeton the runaway *servus*, who, having escaped from his lord's seisin, enjoys a provisional and possessory protection in his self-won liberty. His lord can no longer seize him, but must have recourse to a writ *de nativo habendo*, and in this action the fugitive will have an opportunity of defending himself by an *exceptio privilegii*, e.g. by the plea that he has dwelt for year and day on that privileged soil, the king's demesne. The *statuliber* of the Roman law is a very different person. A testator, for example, says: 'Si Andronicus servus meus heredi meo dederit decem, liber esto,' then Andronicus is *statuliber* until he performs the condition and thereby becomes free. Does Braeton understand that he is giving a new sense to a technical

ex rescripto principis fit servus, 'et qui erat servus, deinde 'fit monachus vel clericus, et postea redit ad secularem 'vitam, restituitur domino suo,' ut C. *de libertis et eorum li.* l.¹ *si manumissus*, et *de pa. qui fi. di.* l. ij.,² et C. *quibus ad lib. non li.* l. ij.,³ et *de episcopis et cle. aut. si servus* :

[C. 6. 7. 2. Si manumissus ingratus circa patronum suum extiterit . . . a patronis rursus sub imperia dicionemque mittatur.

C. 4. 43. 2. Si quis propter nimiam paupertatem egestatemque victus causa filium filiamve sanguinolentos vendiderit, venditione in hoc tantummodo casu valente emptor obtinendi eius servitii habeat facultatem.

C. 7. 18. 2. De latronum familia descendentibus ex largitione principali vel auctoritate fiscali servis factis retro principes libertatem denegari decreverunt.

C. 1. 3. 36. Authent. *de sanct. episc.* (Const. 134. c. 17). . . . Si vero servus sciente vel nesciente domino, sicut diximus, ideo quod in clero constitutus liber est factus, ministerium ecclesiasticum reliquerit et ad secularem vitam transierit, suo domino ad serviendum tradatur.]

'Et est omnium servorum una condicio substantialis. 'quicumque enim servus est ita est servus sicut alius, nec 'plus nec minus.' sed, licet servitutis una sit condicio, tamen honestatis et probitatis et malitiae et nequitiae servorum multae possunt esse condiciones, ut ff. *de aedil. edic.* l. ul. § ult., et ff. *de usuf.* l. *sed etsi quid* § *sufficienter*.

[D. 21. 1. 65. § 2. Servus tam veterator quam novicius dici potest.

D. 7. 1. 15. § 2. Sufficienter autem alere et vestire debet secundum ordinem et dignitatem Mancipiorum.] unde et quidam propter delictum suum, quidam propter arbitrium dominorum non possunt manumitti, alii possunt. In liberis autem multae differentiae sunt. Aut enim ingenui

¹ Om. l. Sp.

² i. not ij. Sp. Gonv. Cai.; but the correction seems necessary.

³ Here also Sp. Gonv. Cai. have i. not ij.

term? More probably he is quite ignorant of the gulf that divides him from Azo and the Roman lawyers.

After this, Braeton (p. 45) cuts short a discussion to which the classical definition of *libertas* has given rise. May we not say that even a slave has power to do whatever he wishes, provided that he be not prevented from doing it by force or by law. Irnerius, so Azo says, did not see his way out of this difficulty. The better exposition, however, of the famous text is this:—Liberty is the natural power, *i.e.* the power given by natural law, of doing what one pleases, in so far as *vis*—which in this context points to the *ius gentium*—or *ius* (*i.e.* *ius civile*) does not prohibit this. This seems to be Azo's exposition of the text. Whether Braeton has understood it is doubtful. By 'licet enim servi efficiantur liberi' (p. 45) he supplies the place of 'licet enim servi sint liberi' which occurs in an argument that Azo rejects. However, the word *efficiantur* is of his own introduction, and seems to show that he is straying.

Braeton's next paragraph (§ 3) is for the most part copied from Azo. It gives the traditional learning as to the etymology of *servus*. Azo found some difficulty in applying this to the *tabellio*; he must be called a *servus* because he serves (*servus a serviendo*), not because he is a captive taken in war who has been spared (*servus a servando*). We may well doubt whether Braeton knew much of *tabelliones*. We have to remember that in medieval Latin the verb *servire* already bears the broad meaning which we give to the English verb *serve*. One man may serve another, and owe service (*servitium*), without being a *servus*, serf, or slave.

In § 4 (p. 47) Braeton departs widely from Azo. He here sets forth the rules as to the transmission of free and servile blood. This topic Azo reserves for the next title. We shall do the like. Braeton then takes up Azo's text at the point (p. 46) where it begins to describe the modes in which a free man becomes a slave. He picks and chooses the sentences that he will copy. He rejects the whole doctrine about men who sell themselves into slavery. For this he substitutes the English rule that a confession of villainage made in the king's court binds him who makes it. He rejects the doctrine that a father who is starving may sell his infant child into slavery; also the doctrine about the *fili latronum*. He adopts the doctrine that a freedman may be reduced into slavery for ingratitude, though he can hardly have had any warrant for this. He adopts the doctrine that the man who has become free by receiving holy orders or entering religion, becomes a *servus* once more if he returns to a secular life; and this may well have been practicable English law. He adopts the doctrine that *servi* are all of one legal condition. He will not follow Azo into any talk about *Latini* and *dediticii*, or discuss the question whether two classes can be called 'many' classes.

sunt aut libertini, et ita duo dicuntur multa, et est argumentum contra ff. *ri. bo. rap.* l. iij. § ij.¹ :

[D. 47. 8. 4. § 3. Turbam autem ex quo numero admittimus? si duo rixam commiserint, utique non accipiemus in turba id factum, quia duo turba non proprie dicuntur.]

vel adice alios, quia alii erant latini, alii dediticii. Sic ergo libertas praedicatur cum magis et cum minus. nam alia est maior alia minor.

De ingenuis [Inst. 1. 4].

‘Est autem ingenuus qui statim ut natus est liber est, sive ex duobus ingenuis, sive ex duobus libertinis, sive ex altero ingenuo et altero libertino natus est.’ Sed et si nascatur ex matre libera et patre servo vel incerto ingenuus nascitur, nisi forte in casu, ut C. *de murileg.* l. *qui aut patre.*

[C. 11. 8. 15. Qui aut patre conchyliolegulo geniti probabuntur aut matre, memoratae adscriptioni obnoxios se esse non ambigant.]

‘et satis est matrem liberam fuisse vel tempore illo quo concepit vel tempore quo parit vel in medio illorum temporum, licet ancilla postea fuerit facta, quia non debet calamitas matris ei nocere qui in utero est,’ ut in. e., et ff. e. l. v. § i.² [Inst. 1. 4 pr ; D. 1. 5. 5. § 2.] In fideicommissaria tamen libertate ancillae relictæ³ aliquando reperio negligentiam matris nocere partui, ut notavi in summa C. *de fideicommiss. lib.* [Azonis Summa C. 7. 4. ad fin.]: nec illud inspicio utrum ex persona matris competat libertas directa nascituro an ex voluntate hominis,⁴ ut C. *de fideicom. li.* l. *cum inter* [C. 7. 4. 14]. et ita, quod est mirum, de ancilla nascitur liber. quod enim dicitur nasciturum haberi pro iam nato, verum est cum tractatur de commodo nascituri, ut ff. *de sta. ho.* l. *qui in utero* [D. 1. 5. 26], sed hic esset incommodum ei quia⁵ esset libertus. dicam igitur eum esse

¹ Corr. *ij.*; Gonv. Cai. *give ij.*

² Corr. *ij.*

³ *relicte*, Gonv. Cai.; *relictae* Bas.

⁴ *hominis* Gonv. Cai.; *patris* Sp.

⁵ *quia* Gonv. Cai.; *qui* Sp. Pap. Ven.

[*De ingenuis.*]

[I. 6. § 5.] Liber vero et 'ingenuus' dici poterit 'qui [f. 5] 'statim ut natus est liber est, sive ex duobus' liberis et 'ingenuis, sive ex duobus libertinis,' scilicet, qui ex iusta servitute manumissi sunt, 'sive ex¹ ingenuo et altero 'libertino,'² sive nascatur ex matre ancilla et patre libero, dum tamen extra villenagium et in libero toro, dum tamen ex matrimonio.³ item si ex matre libera et servo extra matrimonium.⁴ 'Et sufficit matrem esse liberam vel tempore illo quo concepit, vel tempore quo parit, vel saltem 'in medio illorum temporum, licet ancilla facta fuerit, quia 'non debet calamitas matris ei nocere qui in utero est.'

NOTES.

Bracton has forestalled (p. 47) the substance of the title of the Institutes (I. 4) to which he now turns. His rules as to the transmission of liberty and slavery from parent to child differ widely from those that he finds in Azo's work. Azo repeats the main rule set forth in the Institutes, that a child is born free if its mother was free at the time of conception or at the time of birth or in the interval. Then, however, after a brief digression concerning a case of *fideicommissaria libertas*, he makes the admission that the son of a servile father by a free mother is a *servus* by 'the common custom of the realm.' Even in Italy this principle of Germanic law prevails: 'Die Kinder folgen der

¹ Sic Dig. Cr. Ed.; insert *uno* Vulg.

² Sic Dig. Cr. Ed.; *altera libertina* Vulg.

³ *in matrimonio* Twiss from Galeaezo.

⁴ *matrimonio* Cr. Ed.

potius ingenuum. Ex generali tamen consuetudine regni est ut qui nascitur ex patre servo et matre libera sit servus. Inducitur etiam ingenuitas per sententiam ¹ si pronuntiatum est aliquem esse ingenuum in causa servitutis et ingenuitatis. praeiudicat enim ea sententia inter omnes, ut ff. *de statu ho.* l.² *ingenuum*, et *de lib. c.* l.³ *diui*.

[D. 1. 5. 25. Ingenuum accipere debemus etiam eum de quo sententia lata est, quamvis fuerit libertinus, quia res iudicata pro veritate accipitur.

D. 40. 12. 27.]

illa ⁴ enim distinguit, pronuntietur servum illius non videri, an ipsum esse ingenuum, ut prima sententia non praeiudicet omnibus, secunda praeiudicet, nisi esset collusum, ut per totum titulum C. *de collusione dete.* [C. 7. 20]. In causa vero libertinitatis et ingenuitatis sententia non praeiudicat inter alios, ut ff. *si lib. inge. esse di.* l. i. et l. *patronum*, et *ne de statu de.* l. i. § *sed interdum* [D. 40. 14. 1 et 5; D. 40. 15. 1. § 3]. Inducitur etiam ingenuitas per natalium principis restitutionem, ut notavimus in summa C. *de natalibus re.* [Azonis Summa C. 6. 8, *De iure aureorum anulorum et de natalibus restituendis*]. Est et semiplena ingenuitas per ius anulorum aureorum, ut notavimus in C. e. ti.

[Azonis Summa C. 6. 8. Aiunt quidam quod olim liberti aureos anulos ferre non poterant, quod quia lege cautum non invenitur, non credo. immo concedatur ut esset imago libertinitatis et signum semiplenae ingenuitatis.]

Sed et per legem inducitur libertas, ut notavimus in C. *pro quibus c. servi pro praemio acci. libertatem* [C. 7. 13], vel plena, id est ingenuitas, vel semiplena, id est, libertinitas, ut ff. *qui sine manu. ad libertatem per.* l. *qui ob necem*.

[D. 40. 8. 5. Qui ob necem detectam domini praemium libertatis consequitur, fit orcinus libertus.] sed forte in casu illo non datur pretium domino. sed ubi datur domino, ingenuus est, ut C. *pro quibus causis servi pro praemio libertatem accipiunt* l. ij.

¹ The compendium for *summam* Sp.

² Om. l. Sp.

³ c. not l. Sp.

⁴ This refers to the *lex* that has just been cited.

‘ärgeren Hand;’ in other words, if either parent be a slave, the child is born a slave. The Church had sanctioned this hard rule:— ‘Semper enim qui nascitur deteriolem partem sumat’ (c. 15, C. 32. qu. 4). Bracton goes his own way, and states (p. 47) the very curious rules which the English courts of his time were elaborating. The child of two free parents is of course free born. The child of two bond parents is born a *servus*. The illegitimate child of a servile mother is born a *servus*. As to mixed marriages, the condition of the child is determined by the free or villain condition of the tenement in which it is born. This is a thoroughly un-Roman trait, and seems to represent but a passing phase in the history of our law, which in the end came to the conclusion that the child follows the father, and even drew the extreme, if merciful, inference that a bastard, being no man’s son, is always born free. See Vinogradoff, *Villainage*, pp. 59-61.

At the beginning of the section which should correspond to Azo’s discourse on Inst. 1. 4, Bracton once more refuses (p. 53) to follow the simple Roman rule. Whether the child of a free father who has married an *ancilla* is or is not free is a question that we cannot answer until we know whether the free man took his villain bride to ‘a free couch’ or whether he went to dwell with her in her villain tenement. Bracton then refuses to follow Azo into a discussion of the preclusive effect of a judgment which declares that a man was free born; he will have nothing to do with the *ius aureorum anulorum*; nor will he speak of cases in which the State rewards a slave for public services by giving him his liberty; of such cases the English courts know nothing.

[C. 7. 13. 2. Servi qui monetarios adulterinam monetam clandestinis sceleribus exercentes detulerint, civitate Romana donantur, ut eorum domini pretium a fisco percipiant.]

De libertinis [Inst. 1. 5].

Nunc videamus quis sit libertinus, unde dicatur et quot modis contingat libertinitas et quae sit divisio libertinorum. 'Sunt autem libertini qui ex iusta servitute manumissi 'sunt,' ut in. e. in prin. [Inst. 1. 5 pr.]. ut *iusta* servitus dicatur, quia est de iure gentium vel de iure civili, ut et diximus supra ti. prox., licet sit contra ius naturale. vel *iusta* id est vera. vel *iusta* quia adeo et ita iuste servi-erunt domino suo ut mererentur ab eo manumitti. Quid autem sit manumissio diximus supra *de ius. et iu.* [Inst. 1. 1]. Nec distinguo inter libertum et libertinum ut *garamantes*,¹ ut libertus dicatur manumissus, libertinus dicatur filius manumissi. nam et qui manumittitur libertinus est, ut dictum est. 'Diciturque libertinus quasi 'liberatus a servitute.' Procedit autem manumissio vel libertinitas et inter vivos et in ultimis voluntatibus. inter vivos pluribus modis: ut ecce per vindictam manumittitur² quis, ut notavi in C. *de manu. vin.* [Azonis Summa C. 7. 1. *de vindicta libertate et apud concilium manumissione*]. item et inter amicos aut per epistulam. solent enim servi a dominis manumitti adeo ut vel in transitu³ manumittantur, veluti cum praetor vel praeses in balneum vel in theatrum vadit. item ex constitutionibus fiunt manumissiones, ut notavi in C. *si manci. ita ve. ut ma. vel contra*⁴ [C. 4. 57]. Et notandum est in omni manumissione, quod procedit nolente vel invito servo. sed tamen invito serve non petit alius bona sibi addici causa libertatum conservandarum vel servum redimi et manumitti ex causa fidei commissi, C. *de testa. ma. l. ul. § sin vero quidam*, et

¹ *grammatici* Pap. Ven. Bas.; *garamantes* Sp. Gonv. Cai.

² *manumittit* Sp. Bas.

³ *transitum* Sp.

⁴ *circa* Sp.; *contra* Pap. Ven. Gonv.

[*De libertinis.*]

[I. 6. § 6.] ‘Fiunt¹ etiam liberi qui dicuntur libert- [f. 5]
 ‘tini, illi, videlicet, qui ex iusta² servitute manumissi
 ‘sunt: et dicitur libertinus quasi liberatus a servitute.’
 ‘[§ 7.] Item ‘qui ex damnato coitu nascuntur, inter
 ‘liberos non computantur,’ sicut ex adulterio et huiusmodi.
 ‘item qui contra formam humani generis converso more
 ‘procreantur, veluti si mulier monstruosum³ aut pro-
 ‘digiosum sit enixa. partus autem qui⁴ membrorum
 ‘officia ampliavit, ut si sex digitos habeat vel si quatuor
 ‘tantum’ vel si tantum unum,⁵ ‘talis inter liberos connu-
 ‘merabitur.’

[I. 7. § 1.] ‘Est autem alia divisio hominum quod alii
 ‘sunt masculi, alii feminae, alii hermaphroditi.⁶ et differunt
 feminae a masculis in multis, quia earum deterior est
 condicio quam masculorum.’ [§ 2.] ‘Hermaphroditus com-
 ‘paratur masculo tantum vel feminae tantum secundum
 ‘praevalentiam sexus incalescentis.’ Item qualiter servi
 efficiantur liberi per manumissionem, et quis possit manu-
 mittere et quis non, dicetur plenius infra de actionibus et
 servis fugitivis.

[I. 8. § 1.] Liberorum autem hominum quorumcumque [f. 5 b]
 nulla est acceptio apud deum nec etiam servorum, quia
 non est personarum acceptor deus, quia quantum ad deum⁷
 qui maior est fiat⁸ tanquam minor, et qui praecessor fiat⁸
 tanquam ministrator. apud homines vero est differentia
 personarum, quia hominum quidam sunt praecellentes et

¹ Sic Dig. Corb. Cr. Ed.; *Sunt* Vulg.

² Sic Dig. Corb. Cr. Ed. Azo; *ista* Vulg.

³ *monstruosum* Dig. ⁴ *cui natura* Cr. Ed., not *qui*.

⁵ *unus* Dig. ⁶ *hermofroditi* Dig. ⁷ *Dominum* Vulg.

⁸ *fiat . . . fiat* Dig. Cr. Ed.; *fit . . . fit* Vulg.

ff. *de fidei com.* li. 1. *sed si alienare* [C. 7. 2. 15. § 2 ; D. 40. 5. 32]. Libertinorum autem divisio antea tripartita erat. nam quidam dicebantur latini, alii dediticii, alii cives Romani. qui autem essent latini vel dediticii et quare dicerentur liberi et de sublata condicione eorum notavimus in C. *de lati. lib. tol. et dediticia li. tol.* [C. 7. 6 ; C. 7. 5]. Hodie ergo sola civitas optinet Romana, id est, plenissima libertas quam habent omnes Romani cives. Nec distinguitur super aetate manumissi vel manumittentis, dummodo sit maior xx. annis, nec manumissionis modo. quicumque enim manumittitur plenissimam habet libertatem, ut in. e. § ul. [Inst. 1. 5. § 3]. Hodie ergo eadem possunt manumissi quae et manumittentes, iure tamen patronatus illaeso, ut in aut. *ut liberi de cetero* [Const. 79. *ut liberi de cetero aureo non indigeant anulo*].

Fieri potest alia divisio hominum, quia alii sunt legitimi qui nascuntur de legitimo matrimonio, alii non legitimi, ut qui nascuntur vel concipiuntur ex non legitima coniunctione. nam qui ignorante patre de matrimonio filiae concipitur, licet post mortem patris nascatur, non erit legitimus. et sequuntur liberi condicionem patris in honoribus et in curiali condicione, matris autem sequuntur condicionem in libertate, ut ff. *de sta. ho.* l. *cum legitimae*, et l. *Paulus*, et l. *et servorum* § *ingenui*, et C. *de decuri.* l. *eos* et l. *exemplo*, et l. *nullus*.

[D. 1. 5. 19. Cum legitimae nuptiae factae sint, patrem liberi sequuntur: vulgo quaesitus matrem sequitur.

D. 1. 5. 11. Paulus respondit eum, qui vivente patre et ignorante de coniunctione filiae conceptus est, licet post mortem avi natus sit, iustum filium ei ex quo conceptus est, esse non videri.

D. 1. 5. 5. § 2. Ingenui sunt qui ex matre libera nati sunt: sufficit enim liberam fuisse eo tempore quo nascitur, licet ancilla concepit. et e contrario si libera conceperit, deinde ancilla pariat, placuit eum qui nascitur liberum nasci. Nec interest iustis nuptiis concepit an vulgo. . . .

praelati et aliis principantur: dominus papa¹ in rebus spiritualibus quae pertinent ad sacerdotium, et sub eo archiepiscopi, episcopi et alii praelati inferiores. [§ 2.] item in temporalibus² imperatores, reges et principes in his quae pertinent ad regnum, et sub eis duces, comites et³ barones, magnates sive vavasores, et milites et etiam liberi et villani et diversae potestates sub rege constitutae. comites videlicet qui⁴ a comitatu⁵ sive a societate nomen sumpserunt, qui etiam dici possunt consules a consulendo. reges enim tales sibi associant ad⁶ regendum populum dei, ordinantes eos⁷ magno honore et potestate et nomine⁸ quando concingunt⁹ eos gladiis, id est ringis gladiatorum. [§ 3.] Ringae¹⁰ enim dicuntur ex eo quod renes girant, id est circumdant, et unde dicitur, *Accingere gladio tuo, etc.* et ringae¹¹ cingunt renes talium ut custodiant se ab incestu luxuriae, quia luxuriosi et incestuosi sunt deo abominabiles. [§ 4.] gladius autem significat defensionem regni et patriae. Sunt et alii potentes sub rege, qui barones dicuntur, hoc est robur belli. Sunt etiam alii qui dicuntur vavasores, viri magnae dignitatis. vavasor enim nihil melius dici poterit quam vas sortitum¹² ad valetudinem. [§ 5.] Sunt etiam sub rege milites, scilicet ad militiam exercendam electi, ut cum rege et supradictis militent, et defendant patriam et populum dei. Sunt etiam sub rege liberi homines et servi et¹³ eius potestati subiecti, et omnis¹⁴ quidem sub eo, et ipse sub nullo, nisi tantum sub deo. Parem autem non habet in regno suo, quia sic amitteret praeceptum, cum¹⁵ par in parem non habeat imperium. item nec multo fortius superiorem, nec potentio rem habere debet, quia sic esset inferior sibi subiectis, et inferiores pares esse non possunt potentioribus. Ipse autem rex non debet esse sub homine sed sub deo et sub lege quia lex facit regem.

¹ Insert *videlicet* Ed. Vulg.² Insert *sunt* Vulg.³ Omit *et* Vulg.⁴ *Sic* Dig.; *quia* Cr. Ed. Vulg.⁵ *Sic* Dig. Vulg.; *comitiva* Cr. Ed.⁶ *Sic* Dig. Corb. Cr. Ed.; insert *consulendum et* Vulg.⁷ Insert *in* Vulg.⁸ *potestate i. nomine* Cr. Ed.⁹ *cingunt* Cr.; *accingunt* Vulg.¹⁰ *Cinge* Cr. Ed.¹¹ *cinge* Cr. Ed.¹² *vas forcium* Cr. Ed.¹³ Omit *et* Vulg.¹⁴ *Omnes* Cr. Ed.¹⁵ *quia* Cr. Ed.

C. 10. 32. 22.

C. 10. 32. 36. Exemplo senatorii ordinis patris originem unusquisque sequatur, nec valeant specialiter delata rescripta, si quis se matris origine defendens, a maiore curia ad minorem transferri fortasse promeruerit: neque ulla pro more provinciae referri sinatur exceptio.

C. 10. 32. 44. Nullus solius materni sanguinis vinculis illigetur, quia mulierum infirmitas nunquam huiusmodi functionibus reddit obnoxios, a quibus ipsa habetur immunis.]

Nec est praetermittendum 'quod quidam liberi habentur 'pro non liberi, ut qui nascuntur ex damnato coitu,' ut in auten. *quibus mo. na. eff. sui § discretis* [Const. 89. cap. 12]. 'Item qui contra formam humani generis con- 'verso more procreantur,'¹ veluti si mulier monstrosus 'aut prodigiosus sit enixa. partus autem qui membrorum 'officia ampliavit, puta quia sex digitos habet vel quatuor 'tantum,' aliquatenus videtur esse effectus, id est, creatus ut homo et ideo 'connumerabitur inter liberos,' ut ff. *de sta. ho. l. non sunt* [D. 1. 5. 14]. Quod autem dixi monstrosos vel prodigiosos liberos non computari pro liberis, verum est quantum ad institutionem vel exheredationem. si tamen matri esset relictum sub illa condicione, si peperit, et talem partum ediderit, condicionem videtur implere, ut ff. *de ver. sig. l. quaeret aliquis* [D. 50. 16. 135]. 'Fit 'autem alia divisio hominum, quia alii sunt masculi, 'alii feminae, alii hermaphroditi. et differunt feminae a 'masculis in multis, ²quia feminarum est condicio deterior 'quam masculorum,' ut ff. e. l. *in multis* [D. 1. 5. 9],² ut in iurisdictione, arbitrio, tutelae vel curae susceptione, postulatione in iudicio, procuratione, tabularum depositione, intercessionem, adoptionem, testamentaria testificatione, in potestate patria vel materna, quam non habet, et in officio argentariae, ut ff. *de iudic. l. cum praetor § non autem*, et C. *de recept. l. sancimus*, et ff. *de fide instru. l. si de tabulis*, et ff. *de tutelis l. ul.*, et *de regu. iu. l. ij.*, et C. *ad vell. l. j.*, et

¹ creantur Sp.

²—² Omit Cai.

Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem. non est enim rex, ubi dominatur voluntas et non lex. et quod sub lege esse debeat, cum sit dei vicarius, evidenter apparet ad similitudinem Iesu Christi, cuius vices gerit in terris. quia verax dei misericordia, cum ad recuperandum ¹ humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ² ad destruendum opus diaboli non virtute uteretur potentiae sed iustitiae ratione. et sic esse voluit sub lege, ut eos, qui sub lege erant, redimeret. noluit enim uti viribus, sed ³ iudicio. Sic etiam ⁴ beata dei genitrix, virgo Maria, mater domini, quae singulari privilegio supra legem fuit, pro ostendendo tamen humilitatis exemplo legalibus subdi non refugit institutis. Sic ergo rex, ne potestas sua maneat infrenata.⁵ Igitur non debet esse maior eo in regno suo in exhibitione iuris, minimus autem esse debet, vel quasi, in iudicio ⁶ suscipiendo, si petat. si autem ab eo petatur, cum breve non currat contra ipsum, locus erit supplicationi, quod factum suum corrigat et emendet, quod quidem si non fecerit, satis sufficit ei ad poenam, quod deum ⁷ expectet ultorem. Nemo quidem de [f. 6] factis suis praesumat disputare, nec ⁸ multo fortius contra factum suum venire.

NOTES.

One sentence is all that Bracton gives us as an equivalent for a somewhat lengthy passage which Azo devotes to the *libertini*. He must have been tempted both by the text of the Institutes and by Azo's commentary to say something of the modes in which manumission could be effected; but the Roman law of manumission, even as stated in the Institutes, contained too many technical terms to serve as a good model; so Bracton prefers to deal with this matter in another and much less Romanised part of his book. Azo has to speak of *manumissio vindicta, inter amicos, per epistulam, in transitu*

¹ *reparandum* Vulg.

² *quasi* Vulg.; *quo* var. MSS.

³ *Sic* Dig. Corb. Cr. Ed.; insert *ratione et* Vulg.

⁴ *et* Vulg.

⁵ Only a comma in the Vulgate.

⁶ Insert *sibi* Cr. Ed.

⁷ *Dominum* Vulg.

⁸ Omit *nec* Vulg.

ff.¹ *de accusa*. l. *qui accusare*, et ff. *de iu. fis.* l. *deferre*, et ff.¹ *de edendo* l. *penul.*, et insti. *de adopt.* § *sed illud*, et *de testamentis* § *testes*, et idem in populari actione, ut ff. *de populari actione*, l. *mulieri* [D. 5. 1. 12. § 2; C. 2. 55 (56). 6; D. 22. 4. 6; D. 26. 1. 18; D. 50. 17. 2; C. 4. 29. 1; D. 48. 2. 8; D. 49. 14. 18; D. 2. 13. 12; Inst. 1. 11. § 9–10; Inst. 2. 10. § 6; D. 47. 23. 6]. ‘Hermaphroditus comparatur masculo tantum vel feminae tantum secundum praevalentiam sexus incalescentis,’ ut ff. *de sta. ho.* l. *quare*² [D. 1. 5. 10].

Quibus ex causis manumittere non possunt [Inst. 1. 6].

Ne quis ex superioris³ ti. ult. § crederet cuilibet licere manumittere, supponit in hoc titulo causas ex quibus homines manumittere non possunt. quae causae certe multae sunt ex quibus manumitti aliquis prohibetur, vel quia⁴ pignori est servus datus, vel quia manumissor non est dominus, vel quia servus ad libertatem pervenire prohibitus est, et aliae connumerantur causae, ut notavimus in summa C. *qui manumittere non possunt*, et in ti. *qui non pos. ad lib. perve.* et in ti. *qui a non do. ma. sunt*, et *de servo pi. da. manumisso* [C. 7. 11; C. 7. 12; C. 7. 10; C. 7. 8]. sed in hoc titulo non prosequitur nisi duas causas, scilicet, quia quis manumittit in fraudem creditoris, vel quia est minor xx. annis. et de prima causa et secunda quando et qualiter per eas impediatur manumissio, dic ut notavimus in summa C. *qui ma. non pos.* [C. 7. 11] §⁵ *Item alii non manumittunt* et⁶ in summa C. *de vindic. lib.* § *potest* et in summa C. *de fideicommiss. lib.* § *potest* [Azonis Summa: C. 7. 1. § *Potest quis vindicta*; C. 7. 4. § *Potest autem hanc libertatem*].

¹ C. Sp.

² Corr. *quacritur*.

³ Gonv. Cai.; *superioribus* Sp.

⁴ Gonv. Cai.; omit *quia* Sp.

⁵ Omit § Sp.

⁶ et Gonv. Cai.; *ut* Sp.

praetoris, and so forth; he has also to notice the *Latini* and the *dediticii*. Incidentally, he condemns those who hold that a *libertinus* is the son of a *libertus*. According to some versions of his text, he attributes this opinion to the grammarians (*grammatici*). But really he seems to have called his opponents *Garamantes*. The name of this African people seems to have become a term of contempt. Compare our 'niggers.'

In commenting on the title of the Institutes *De libertinis* (1. 5), Azo is led away into noticing some other distinctions between various classes of human beings besides that which turns on their freedom. Thus, they are (i) legitimate, (ii) illegitimate; again, they are (i) male, (ii) female, (iii) hermaphrodite. Bracton (p. 57) culls a few sentences from this dissertation. Apparently, however, he has misunderstood his guide, being misled by the ambiguous *liberi*, which will stand for *free men* or for *children*. If we have regard to the context, we must read this passage as asserting that children born *ex damnato coitu* are not born free. But this is not what Azo meant: he meant that such children are not children within the meaning of certain imperial constitutions which allow *naturales filii* to inherit from their father. So, again, Azo means to deny, not that a monster is free, but that it is a child within the meaning of the rules about inheritance and disinheritance.

We could wish that Bracton had thought fit to enumerate the rules of English law which distinguished between males and females. He rejects Azo's list of rules (p. 60), which contains some terms that may have puzzled him; but he is not prepared to make a list of his own.

The promise to speak of manumissions is perhaps fulfilled by passages (ff. 190 b, 194 b, 198 b) in the portion of his book which treats of the novel disseisin; but he has left us no full account of the action for the recovery of runaway serfs.

Having postponed his treatment of manumission, Bracton comes to two titles of the Institutes which do not interest him: *Qui ex quibus causis manumittere non possunt* (1. 6); *De lege Fufia* [or *Fusia*] *Caninia sublata* (1. 7). He takes nothing from them, nor from Azo's commentary upon them. In their place, however, he puts a discourse (p. 57) on the divers kinds of free men that is all his own. A remark in the Institutes (1. 3. § 5) may justify this interpolation: 'In liberis *multae differentiae sunt*.' A few points in this passage are worthy of remark. Bracton, while he places the pope at the head of the spiritual world, refuses to place the emperor at the head of the temporal world: *imperatores, reges et principes* stand on one level. Here he is deliberately departing from the doctrine of the Italian legists. His queer etymological speculations will not escape notice. The name *consul* has in the past been very commonly given to English earls by writers who prided themselves on their latinity. A mystic meaning is found for the earl's belt. The *ringae* are so called because '*renes girant*.' Allusion is made to Psalm xlv. 4: 'Gird thee with thy sword upon thy thigh, O thou most mighty' (*Aecingere gladio tuo super*

De lege Fusia Caninia tollenda [Inst. 1. 7].

Lex Fusia non permittebat in testamento manumissiones nisi usque ad certum numerum servorum, sed inter vivos poterat quis manumittere servos quotcumque volebat. hodie licet in testamento quod licebat et hodie licet¹ inter vivos, sic et e contrario, quod licet in testamento licet per pactum, ut ff. *de pactis* l. *pactum* [D. 2. 14. 46].

De his qui sui vel alieni iuris sunt [Inst. 1. 8].

Super statum personarum perfectam traditurus² doctrinam, aliam ab his quas superiori titulo prosecuti sumus, supponit divisionem, ut facilius per divisiones tradatur doctrina. partitio enim sive ‘divisio animum legentis’ incitat, mentem intelligentiae praeparat, memoriam artificiose reformat. Est autem haec divisio talis, quod³ ‘omnis homo aut est sui iuris, aut alieni, aut dubii, secundum quosdam.’⁴ hoc enim tertium membrum ponitur ‘secundum quosdam’⁴ qui dicunt statum alicuius quandoque ‘esse in suspenso,’ scilicet filiifamilias cuius pater ‘captus est ab hostibus,’ ut Inst. *quibus mo. ius pa. po. solvitur*.

¹ Omit *licet* Gonv.² *tradidimus* Cai.³ Gonv. Cai.; *quia* Sp. Bas.⁴⁻⁴ Omit Sp. Bas. Gonv.; insert Cai.

femur tuum potentissime.) The *vavassor* is '*vas sortitum ad valitudinem*,' a chosen vessel for strength. Bracton would hardly have ventured upon this feat of philology if in the *vavassores* he had seen, as some writers see, the *vassi vassorum*; but of the *vavassor* he can say little, for in England this name seems never to have acquired a precise legal meaning. So again *baro* is '*belli robur*.'

The theory of the kingship that Bracton here states (p. 59) is a very different one from that set forth by him or by some one else on a later page of the printed book (f. 34). There we are told that the king has as superiors (1) God, (2) the law, and (3) his court; for the earls are the king's *comites*, and he who has a *comes* has a master (*magister*). Here we are told that the king, though below God and the law, is below no man. The earls are not the king's peers, much less his superiors. If the king does wrong his punishment must be left to God. The contradiction is flagrant, and if the same man wrote both passages he must have modified the first principles of his political theory.

The doctrine that the king is below the law is enforced in the fashion of the time by the example of Christ, who placed himself below the law. In expounding this article of the Christian creed, Bracton uses a juristic phrase, the import of which should not escape us. Christ, when he desired to 'recover' the human race, preferred 'due process of law' to a lawless self-help: '*noluit enim uti viribus sed iudicio.*' Even Satan was not to be disseised '*sine iudicio.*'

[*De his qui sui vel alieni iuris sunt.*]

[I. 9. § 1.] Dictum est supra de statu personarum, [f. 6] nunc supponenda est '*alia divisio*,' ut per divisiones facilius¹ tradatur doctrina, '*partitio enim sive divisio animi legentis incitat, mentem intelligentiæ præparat, memoriæ artificiose reformat. Est autem hæc divisio talis, quod omnis homo aut est sui iuris, aut alieni, aut dubii, secundum quosdam, qui dicunt statum alienius esse in suspensio, sicut*' de eo '*qui captus est ab hostibus. sed revera absurdum esset*² '*aliquem eodem tempore nec in patris nec in sua potestate fuisse. quod enim dicitur, pendere status,*³ '*verum est ratione futuræ fictionis post-*

¹ *facilior* Vulg.

² *Sic* Dig. Corb. Cr. Ed.; insert *dicere* Vulg.

³ *Sic* Dig. Corb. Cr. Ed. Azo; *pendente statu* Vulg.

§ *si ab hostibus* [Inst. 1. 12. § 5]. nos contradicimus. ‘esset enim absurdum eodem tempore nec in patris nec in sua’ quemquam ‘fuisse potestate,’ ut C. *de sententia pas.* l. ult. [C. 9. 51. 13]. ‘quod enim dicitur pendere status verum est ratione futurae fictionis postliminii quod omnino speratur a iure,’ utpote benignius, ut ff. *de bonis lib.* l. *si necem*, § *si deportatus* [D. 38. 2. 4. § 2]. ‘si enim revertatur, fingitur non fuisse captus,’ ut in praedicto § *si ab hostibus*, ‘sed inspecto praesenti statu nunquam pendet, cum lex dicat captum ab hostibus esse servum,’ ut supra *de iure personarum* [Inst. 1. 3. § 3]. ‘ergo impossibile est quod filium habeat in potestate sua,’ ut ff. *ad l. iul. de adult.* l. *sic eveniet* [D. 48. 5. 22]. ‘et generaliter dico nulla praesentia, nulla praeterita pendent,’ et propter hoc multi difficiles nodi solvuntur. ‘Sui autem iuris sunt omnes qui non sunt in aliena potestate. cognitis ergo personis quae sunt alieni iuris per consequentiam datur intellegi omnes alias esse sui iuris. In potestate aliena sunt servi,’ item filii. ‘quae quidem potestas dominorum coepit a iure gentium. nam’ apud omnes gentes ‘erat dominis potestas in servos vitae et necis.’ ‘sed postea iure civili coartata est’ dominorum potestas, nec licet alicui super modum et sine causa legibus cognita in servos suos saevire, ‘alioquin non puniretur minus quam si occideret servum alienum,’ ut ff. *e. l. i.* [D. 1. 6. 1. § 2], si criminaliter agatur. lege enim Aquilia non tenetur, quia illa non contra dominum sed domino datur, ut ff. *ad l. Aquil.* l. *item Mela*, et l. *ob id* [D. 9. 2. 11 et 43], et de hac castigatione plenius notavi quid obtineat in C. *de emendat. servorum* [C. 9. 14]. Sed et subvenitur servis ‘contra dominorum saevitiam,’ vel famem,¹ vel ‘intolerabilem iniuriam,’ ut possint adire praesidem, et ipse, si vel durius habitos servos quam aequum est cognoverit, vel infami iniuria affectos, venire iubeat eos bonis condicionibus, id est, ne² in potestatem dominorum iterum revertantur. ‘expedit enim rei publicae ne quis re sua male utatur,’ ut in. *e.* § i.³ et ff. *e. l. ii.* [Inst. 1. 8. § 2; D. 1. 6. 2]. ‘Est’ alius ‘effectus huiusmodi

¹ infamem Bas.² ut Cai.³ Corr. ii.

‘liminii, quod omnino speratur¹ a iure. si enim revertatur, fingitur non fuisse captus, sed inspecto² praesenti statu nunquam pendet, cum lex dicat captum ab hostibus esse servum. igitur impossibile³ est quod filium habeat in potestate sua. et generaliter verum⁴ est quod nulla praesentia, nulla praeterita pendent.’

[I. 9. § 2.] ‘Sui autem iuris sunt omnes qui non sunt in aliena potestate. cognitis ergo⁵ personis quae sunt alieni iuris, per consequens sciri poterit omnes alias⁶ esse sui iuris.’ [§ 3.] ‘In potestate autem⁷ aliena sunt servi. quae quidem potestas dominorum’ in servos ‘a iure gentium est,⁸ quae aliquando fuit et vitae et necis servorum, sed nunc coartata est per ius civile,’ ita⁹ quod vita et membra sunt in potestate regis, ita quod si quis servum suum occiderit, ‘non minus punitur¹⁰ quam si alienum occideret.’¹¹ et in hoc legem habent contra dominos, quod stare possunt in iudicio contra eos de vita et membris ‘propter saevitiam dominorum, vel propter intolerabilem iniuriam,’ ut si eos destruant, quod salvum non possit eis esse wainagium¹² suum. ‘Expedit enim rei publicae ne quis re sua male utatur.’ ‘Est autem’ ‘effectus huius dominicae potestatis quod quicquid per servum iuste acquiritur id domino acquiritur, vel quasi domino, sicut bonae fidei possessori, vel usuario,¹³ vel fructuario.’

{¹⁴ Hoc autem verum est¹⁵ de illis servis qui tenent de antiquo dominico coronae. Sed de aliis secus est, quia quandocumque placuerit domino auferre poterit a villano suo wainagium suum et omnia bona sua.¹⁶}

¹ Sic Azo; but the MSS. have *separatur* or *separata*. The true reading has not been found.

² Sic Cr. Ed. Vulg. Azo; in *suspecto* Dig. Corb.

³ Sic Azo; *possibile* Dig. Vulg. var. MSS.; *impossibile* Gl. Chert.

⁴ *vera* Vulg.

⁵ *autem* Vulg.

⁶ *alios* Vulg.

⁷ Omit *autem* Vulg.

⁸ Omit *est* Dig.

⁹ Omit *ita* Dig. Cr.

¹⁰ *punitur* Vulg.

¹¹ *occiderit* Vulg.

¹² *doannagium* Dig.; *dotamagium* Corb.

¹³ Sic Dig. Corb. Ed. Reg.; *usurario* Cr. Vulg.

¹⁴ In the Vulgate this passage is introduced between *esse wainagium suum* and *Expedit enim*. It is not in Dig. Corb. Cr. Ed. Reg. PB. PF. Shep. Gray. It stands in the margin of PD. and Ha., and in the text of Gl. PA. PC. Chert.

¹⁵ *intellegendum est* PA.

¹⁶ *et omnia bona sua* Gl. PC. PD.; *et alia bona sua* PA.

‘dominicae potestatis, quia quicquid per servum iuste
 ‘adquiratur domino acquiritur, vel quasi domino, ut bonae
 ‘fidei possessori vel usuuario vel fructuario.’ acquiritur,
 dico, principaliter vel secundario, ut cum servus stipulatus
 est sibi licere ire, agere: ipse enim tantum¹ ire potest non
 dominus eius, ut in. *de sti. ser.* § *sed cum factum* et in. e. et
 ff. e. l. i. et *de acqui. pos.* l. *quod servus* [Inst. 3. 17. § 2;
 D. 45. 3. 1; D. 41. 2. 24]. Qualiter autem adquiratur
 bonae fidei possessoribus vel fructuariis vel usuariis,² dic
 ut notari in C. *per quas personas nobis adquiritur* [C. 4. 27].
 Est et tertius effectus, quia servus non torquetur in domi-
 num suum praesentem vel praeteritum, ut C. *de quaestionibus*
l. servos non.

[C. 9. 41. 14. Servos non solum pro dominis sub
 quorum dominio sunt constituti, sed nec pro his quorum
 antea fuerunt, interrogari posse constat.]

‘In potestate autem patrum sunt filii qui nascuntur
 ‘ex iusto et legitimo matrimonio,’ ut ff. e. l. iii. et iiiii. et v.
 [D. 1. 6. 3 et 4 et 5]. ‘idem in nepotibus et pronepotibus
 ‘quantum ad avos et proavos paternos,’ ut ibidem dicitur.
 ‘et praesumitur esse filius hoc ipso quod nascitur ex uxore,
 ‘quia nuptiae probant filium,’ ut ff. *de in ius vo.* l. *quia*
semper.

[D. 2. 4. 5. . . . quia semper certa est, etiamsi
 vulgo conceperit: pater vero is est quem nuptiae
 demonstrant.]

‘nisi probetur contrarium: ut ecce maritus probatur non
 ‘concubuisse aliquamdiu cum uxore, infirmitate vel alia
 ‘causa, vel erat in ea valetudine ut generare non possit,
 ‘vel probatur quod fuerit absens per decennium, et re-
 ‘versus invenit anniculum.’ hic qui in domo mariti natus
 ‘est, licet vicinis scientibus, non est filius mariti,’ ut ff. e.
 l. *filium.*

[D. 1. 6. 6. Filium eum definimus qui ex viro et
 uxore eius nascitur. sed si fingamus afuisse maritum,
 verbi gratia per decennium, reversum anniculum

¹ Cai; omit *tantum*, Sp.

² *usurariis* Sp. Gony.; *usuariis* Cai.

[I. 9. § 4.] ‘In potestate autem patrum¹ sunt filii qui nascuntur ex iusto et legitimo matrimonio. idem in nepotibus et pronepotibus quantum ad avos et proavos paternos.’

{² Qui igitur ex te et uxore tua nascitur in tua potestate est. item qui ex filio tuo et eius uxore nascitur, id est, nepos tuus et neptis, aequè in tua potestate sunt, et pronepos et proneptis et deinceps ceteri. qui vero ex filia tua nascitur, in potestate tua non est, sed in patris eius vel avi vel proavi.³}

‘Et praesumitur quis esse filius hoc ipso quod nascitur ex uxore, quia nuptiae probant filium,⁴ et semper stabitur huic praesumptioni donec probetur contrarium. ut ecce maritus probatur non⁵ concubuisse aliquamdiu cum uxore, infirmitate vel alia causa,⁶ vel erat in ea valetudine⁷ ut generare non possit, vel probatur quod fuit absens per decennium et reversus invenit anniculum.⁸ hic qui in domo mariti natus est, licet vicinis scientibus, non erit [f. 6 b] filius mariti.’ Et de hac materia inveniri poterit plenius infra, de partu⁹ supposito.

NOTES.

Bracton now (p. 65) returns to Azo, who is beginning to comment on Institutes 1. 8. But Bracton, unless our manuscripts do him an injustice, misunderstands the text that lies before him. Justinian says that of persons some are *sui iuris*, while others are *alieni iuris*. Upon this Azo remarks that there are who would add to these two classes a third, consisting of persons who are *dubii iuris*. Such is the case, they hold, when a *paterfamilias* is taken captive by the enemy. The

¹ *paterna* Cr.

² The Vulgate introduces this passage at the end of the preceding paragraph after *fructuario*. It is taken from the Institutes, 1. 9. 3. It is not in Dig. Corb. Cr. Ed. Reg. Gl. Sh. Chert. Stowe, Ha. This seems enough to prove that it is no part of Bracton's original text, and that it can hardly come from Bracton's hand.

³ The last four words are an addition to the Institutional text.

⁴ *Sic* Dig. Cr. Azo; insert *esse* Vulg.

⁵ *non probatur* Cr. Ed.

⁶ *Sic* Dig. Corb. Azo; insert *impeditus* Vulg.; this is interlined in Cr.; *impedite* Ed.

⁷ *Sic* Dig. Cr. Ed. Azo; *invaletudine* Vulg.

⁸ *masculum*, Cr.

⁹ *parte* Cr.

invenisse in domo sua, placet nobis Iuliani sententia hunc non esse mariti filium.]

De hac autem patria potestate plenius dicitur in sequenti titulo.

De patria potestate [Inst. 1. 9].

Quia de patria potestate superiori titulo habuit mentionem, ponit hic de ea. Videndum ergo qualiter patria potestas constituatur, et quis sit eius effectus: quod dic ut notavimus in summa C. e. titulo [C. 8. 46 (47)].

De nuptiis [Inst. 1. 10].

Quia patria potestas per nuptias constituitur, ponit de nuptiis. Videndum ergo quid sint nuptiae, et unde dicantur, et qui possint contrahere nuptias, et quibus rationibus quis prohibeatur cum alia persona contrahere matrimonium,¹ et quorum consensus in contrahendo exigatur, et quando perficiatur matrimonium, et quis sit effectus, et quae sit poena contrahentis incestas nuptias: quod dic ut notavimus in summa C. in eo. titu. et *de incestis nuptiis* [C. 5. 4; C. 5. 5].

De adoptionibus [Inst. 1. 11].

Quia patria potestas per adoptionem constituitur, ponit de adoptionibus. Videndum ergo quid sit adoptio, et qualiter distinguatur, et quis sit eius effectus: quod dic ut notavimus in summa C. e. ti. [C. 8. 47 (48)], eo attento, quia² quod dicit lex adoptatum ab avo materno transire in potestatem suam, quia in eius personam concurrunt naturalia et adoptionis iura, naturalia³ enim iura intellego natalia,⁴ hoc est quia ab eo ducit originem, nam secus est si daretur fratri vel similibus in adoptionem. item quod dicit in. e. [Inst. 1. 11. § 7] si adopto aliquem loco nepotis, quasi natum ex filio, filius debet consentire ne ei invito suus heres

¹ *matrimonio* Sp.

² Omit *quia* Bas.

³ See Cod. 8. 47 (48). 10. § 1. How should Azo's text be punctuated?

⁴ Sic Pap. Ven. Bas.; *naturalia* Sp. Gony.

filiusfamilias is now *dubii iuris*: for, if his father returns, the fiction of *postliminium* will be applied and the law will regard the son as having been all along in his father's *potestas*. Azo protests against the doctrine of 'dubious status.' The son is now *sui iuris*, though hereafter he may be treated as having been *alieni iuris*. Bracton copies a great part of this argument, but spoils the whole of it by speaking (this, at least, is the most natural meaning of his words) as though the question were as to the status of the person who is taken captive, not as to the status of that person's son.

Azo says: '. . . secundum quosdam, qui dicunt statum alienius esse in suspenso, scilicet *filiusfamilias cuius pater captus est ab hostibus* . . .'

Bracton says: '. . . secundum quosdam, qui dicunt statum alienius esse in suspenso, sicut *de eo qui captus est ab hostibus* . . .'

No better version than this has been found of Bracton's text. A few lines lower down (p. 67) we find many manuscripts and our Vulgate version giving the stupid *possibile* instead of *impossibile*. All this learning about the *patria potestas* passes over the heads of the copyists; it is so useless.

Azo describes the limits that were set by imperial constitutions to the master's rights over his slaves. Bracton follows him and in a very important passage (p. 67) he declares that the villain (*servus*) is protected against his lord, not only in the enjoyment of life and member, but also in the enjoyment of his wainage. The Vulgate text inserts at this point a remark which abbreviates this concession by declaring that it extends only to those *servi* who hold of the ancient demesne of the crown. The MSS. leave no room for doubt that this is a gloss, and to all appearance it is not one of Bracton's own glosses. (See Vinogradoff, *Law Quarterly Review*, i. 197; *Villainage in England*, 75.) That Bracton intended to protect the villain's wainage against the lord seems clear.

In some MS. which was the parent of a large family the word *wainagium* was corrupted. Already in the Digby MS. we find *do-annagium*, and this becomes common.

As to the persons who are in paternal power, Bracton follows Azo without any divergence, and he also copies the sentences about the presumption of paternity. His promise to say more of supposititious children is fulfilled on f. 69. The passage which we have enclosed in brackets (p. 69) is given in the old edition, but we have looked in vain for it in many manuscripts. It is taken, not from Azo, but from the Institutes, 1. 9, where it runs thus:

'Qui igitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aequè in tua sunt potestate et pronepos et proneptis et deinceps ceteri. qui tamen ex filia tua nascitur in tua potestate non est sed in patris eius [vel avi vel proavi].'

adgnascatur, ita potest intellegi ac si diceret, hoc ei continget licet ei molestum sit futurum. et si quidem consentiat filius, post mortem sui patris in suam recidit hic nepos potestatem, nec adgnascitur avo suus heres. si autem filius non consenserit, mortuo patre, non recidit hic nepos in potestatem filii et adgnascetur avo suus heres, ut dictum est, vel tanquam filius vel tanquam nepos, licet in filium non adoptaverit ipsum, vel tanquam nepotem, quia eum sibi heredem fieri videtur avus voluisse, licet Pla[centinus] dixerit contra. vel licet iste nepos mortuo avo non recadat in potestatem sui patris, nihilominus tamen est eius filius, ut ff. e. l. *cum nepos*, et l. *si quis*, et l. *si is qui* [D. 1. 7. 6. et 10. et 44]. Item nota quod adoptio non iure facta potest confirmari a principe: non tamen solet fieri nisi adhibitis his qui laederentur confirmatione adoptionis, ut ff. e. l. *arrogatio*¹ *non iure*, et l. *nam ita* [D. 1. 7. 38 et 39].

Quibus modis ius patriae potestatis solvitur [Inst. 1. 12].

‘Exposuimus quemadmodum dominica et patria² ‘potestas constituatur’ et quemadmodum dominica tollatur. ‘nunc audiamus quemadmodum’ potestas patria ‘dissolvatur. et certe dissolvitur tribus modis, scilicet, morte ‘naturali et morte civili et dignitate,’ item emancipatione. ‘Morte naturali, ut si pater qui habet filium in potestate ‘moritur, nam eius filii incipiunt esse sui iuris. mortuo ‘vero avo paterno nepotes eius non fiunt sui iuris, immo ‘recidunt in potestatem sui patris, si tamen pater eorum ‘vivit tunc³ cum moritur avus et nullo tempore exivit de ‘cuius potestate per emancipationem vel alium modum,’ nisi contra⁴ exierit per episcopalem ‘dignitatem,’ tunc enim perinde est ac si remansisset in potestate sui patris, ut in. e. in prin. et ff. *de adop.* l. *si pater*, et in auten. *constitutio quae dignitatibus*.

¹ *adoptio* in Digest; *arrogatio* Sp. Pap. Ven. Gonv. Cai.

² *prima*, not *patria*, Sp.

³ Gonv. Cai.; *nunc* Sp.

⁴ Omit *contra* Ven. Gonv. Cai. Bas.

The last four words are not in Justinian's text. This passage is so rare in the manuscripts that we cannot attribute it to Bracton. He probably thought that he had said quite enough about the matter when he had copied Azo's text. Nothing but the glamour of an almost sacred book can have prevented him from seeing that all this talk of *patria potestas* was out of accord with the English law of his own day. Perhaps as he writes it down he thinks only of infant children. Happily for him, Azo says very little about the *potestas* in his shorter work, but refers his readers to the *Summa* of the Code.

[*Quibus modis ius patriae potestatis solvitur.*]

[I. 10. § 1.] 'Dictum est supra, quemadmodum dominica [f. 6 b] et patria potestas constituatur. nunc autem dicendum, qualiter dissolvatur et tollatur. et sciendum quod tribus 'modis' in liberis personis, 'videlicet morte naturali et 'morte civili, et dignitate.' Item in servis, dominica potestas tollitur manumissione.¹ 'Morte naturali, ut si 'pater qui habet filium in potestate moriatur, nam eius 'filii incipiunt esse sui iuris,' quamvis aliquando remaneant sub tutela dominorum et² sub cura amicorum vel parentum. 'Mortuo vero avo paterno³ nepotes eius non 'fiunt⁴ sui iuris, sed recidunt⁵ in potestatem sui patris, si 'pater eorum vivat cum avus⁶ moriatur, et nullo modo 'exiverit⁷ de patris potestate per emancipationem vel alium

¹ Sic Dig.; expunge the stop and insert *et* Vulg. This changes the sense.

² *vel* Cr. Ed.

³ Sic Dig. Ed. Azo; *patrono* Cr.; *patruo* Vulg.

⁴ Sic Dig. Ed. Azo; *sunt* Cr. Vulg.

⁵ Sic Dig. Vulg.; *recedunt* Cr. Ed.

⁶ Insert *eorum* Cr. Ed.

⁷ Sic Dig.; *exiunt* Cr. Ed.; *exierint* Vulg.

[Inst. 1. 12 pr.

D. 1. 7. 41. Si pater filium, ex quo nepos illi est in potestate, emancipaverit, et postea eum adoptaverit, mortuo eo, nepos in patris non revertitur potestatem. nec is nepos in patris revertitur potestatem, quem avus retinuerit, filio dato in adoptionem quem denuo readoptavit.

Auth. Const. 82, cap. 2 [Nov. 81]. . . . Non enim volumus eum, qui ita suae potestatis fit, perdere aliquod legitimorum ius, . . . et filii eorum post mortem avorum sub eorum recidant potestatem. . . . Palam vero est nullum esse qui nesciat prae omnibus sanctissimis episcopis ipsa ordinatione etiam suam potestatem adquiri.]

‘Item morte civili, ut cum pater damnatur’ in metallum vel in opus metalli vel deportatur in insulam. ‘nam si’ ‘relegetur, nihilominus retinet liberos in potestate sua,’ ut in. e. § *eum autem* et § *poenae* [Inst. 1. 12. §§ 1. et 3]. item quandoque propter delictum etiam sine amissione civitatis, ut si contraxerit incestas nuptias, ut in auten. *de incestis nuptiis*, § *saneimus* [Const. 12. cap. 1]. ‘Dignitate’ autem omnimodo solvitur patria potestas, quae liberaret aliquem curialem a curiali conditione, ut si fieret patricius, consul, praefectus praetorio, praefectus urbis, praefectus orientis qui augustalis forte dicitur,¹ quaestor, magister militum, patronus fisci, princeps agentium in rebus, magister scrinii memoriae principis, magister sacri scrinii libellorum, magister sacri scrinii memoriae principis,² magister sacrarum epistularum et sacrarum cognitionum et dispositionum, vel ‘si’ ‘fiat episcopus,’ ut in C. *de deeur.* l. ul. et in aut. constitutio *quae digni.* § penul. [C. 10. 32 (31). 67; Const. 82. cap. 3]. ‘Emancipatione solvitur patria potestas,’ ut si pater coram competenti iudice relaxat filium a potestate sua: de qua, quid ipsa sit, et unde dicatur, et qualiter fiat, dic ut notavi

¹ *dicebatur* Cai.

² This title is thus repeated in Sp. Pap. Gonv. Cai. It occurs but once in Ven. The passage in the Code has ‘viri spectabiles proximi sacri scrinii memoriae et sacrarum epistularum, nec non sacri scrinii libellorum sacrarumque cognitionum et dispositionum.’

modum,' sicut 'per dignitatem.'¹ 'Item morte civili, ut si 'pater damnetur' propter aliquam feloniam,² vel alius antecessor, vel perpetuo exuletur. 'si autem relegetur ad 'tempus, nihilominus retinebit liberos in potestate sua,' quia sua, cum remeabit, habebit. 'Item dignitate' aliquando,³ 'per episcopalem dignitatem.' 'Item emancipatione'⁴ solvitur⁵ patria potestas,' ut si quis filium suum forisfamiliaverit cum aliqua parte hereditatis suae, secundum quod antiquitus fieri solet. Item solvitur dominica potestas quandoque manumissione, ut si dominus servum suum manumiserit quacunque ratione manumissionis, secundum quod inferius dicitur de manumissionibus.

NOTES.

Bracton here (p. 73) skips over three titles of the Institutes: *De patria potestate* (1. 9), *De nuptiis* (1. 10), *De adoptionibus* (1. 11). As to the first two of these three matters Azo does no more in his smaller Summa (p. 70) than send us to the Summa of the Code. Bracton may well have felt that the model for a statement of the law of marriage was not to be found in Justinian's books, so thoroughly had it been rewritten by the Christian church. Azo, when dealing with this subject in his longer Summa, has to distinguish between the *ius fori* (Roman law) and the *ius poli* (canon law) which has now got the upper hand. Of adoption Azo speaks (p. 70) at some length; but Bracton will not follow him, for the English law of his day knows no adoption. And so we come to tit. 12, *Quibus modis ius potestatis solvitur*. Bracton copies several sentences from Azo's commentary; but does not take them very seriously. He is thinking chiefly, if not solely, of children who are under age, and probably has no true conception of the Roman *patria potestas*. When a man dies, his children become *sui iuris*, 'though in some cases they remain under the 'tutela of their lords or the *cura* of their friends or kinsfolk': this is a characteristic sentence. Then he blunders over Azo's text. Azo says (p. 72) that when a grandfather dies, his grandchildren (children of his son) fall into the *potestas* of that son, unless that son has gone out of his father's *potestas* by emancipation or some other mode. He adds, however, that if this son left the father's *potestas*, not by emanci-

¹ But Azo has *nisi per episcopalem dignitatem*.

² Insert *commissam* Vulg.

⁴ *per emancipationem* Vulg.

³ Insert *ut* Vulg.

⁵ *solet* Cr. Ed.

in summa C. *de emancipatione* [C. 8. 48 (49)]. De adoptione non dico, quia ibi non tollitur sed magis transfertur¹ potestas. Item nec de sententia, quia licet contra me detur, nihilominus tamen in potestate mea remanet, ut ff. *de condictione in. l. iul.* :

[D. 12. 6 (de condictione indebiti). 60. Iulianus verum debitorem post litem contestatam manente adhuc iudicio negabat solventem repetere posse, quia nec absolutus nec condemnatus repetere posset: licet enim absolutus sit, natura tamen debitor permanet. . .] licet quantum ad me pro emancipato habeatur.

De tutelis [Inst. 1. 13].

‘Prima divisio personarum fuit illa: omnes homines aut sunt liberi aut sunt servi. secunda fuit alia: quaedam personae sui iuris sunt, quaedam alieno iuri subiectae. Nunc autem’ primi membri secundae divisionis ‘assignat divisionem talem, quod earum personarum quae non sunt in potestate aliena, quaedam in tutela vel in curatione sunt, quaedam neutro iure tenentur.’ Videamus itaque quid sit tutela, et unde dicatur, et cui detur tutor: quod dic ut notavimus in summa C. *de testam. tu.* usque ad illum § *datur tutor* [C. 5. 28].²

¹ confertur Bas.

² Azo proceeds to comment on the remaining thirteen titles of the First Book. In many cases his commentary consists of mere references to his Summa of the Code. We do not print this part of his work, as Braeton skips over it.

pation, but by promotion to the episcopal office, then on his father's death the case will be treated as though there never had been any dissolution of the *potestas*. Bracton, or an early copyist of his book, turns this inside out by substituting 'per emancipationem vel alium modum sicut per dignitatem' for 'per emancipationem vel alium modum, nisi exierit per episcopalem dignitatem.' Probably Bracton does not realise that by implication he is speaking of bishops who have children. Yet the episcopal dignity is the only *dignitas* that he mentions as capable of dissolving paternal power, whereas Azo is learned about prefects, quaestors, and their like. Then Bracton feels himself compelled to say a word about emancipation. But what can he say? Really we have no such thing in England. Glanvill suggests a way of escape. 'The paternal power may,' says Bracton, 'be dissolved by emancipation, as if one forisfamiliates a son with a part of the inheritance, as was done in old times.' This seems to be an allusion to Glanvill, who, writing while our strict law of primogenitary inheritance was but beginning to take shape, describes (lib. vii. c. 3) how a son may be 'forisfamiliated' by being enfeoffed by his father, and shows how such a provision made for a son *inter vivos* may affect the inheritance which opens on the father's death. In Bracton's day such forisfamiliation already belongs to the past; the 'advance-ment' (as we call it) of a son will not prevent him or his issue from inheriting under the ordinary rules.

[*De tutelis.*]

[I. 10. § 2.] 'Prima divisio personarum fuit talis, quod [f. 6b] ' omnes homines aut liberi sunt aut servi. secunda, quod ' quaedam personae sunt sui iuris, et quaedam alieno iuri ' subiectae. Nunc sequitur alia divisio, quod personarum, ' quae non sunt in potestate aliena, quaedam sunt in ' custodia sive ' tutela ' dominorum, ' quaedam in curatione ' parentum et amicorum, secundum quod inferius plenius dicetur de custodia et cura. ' quaedam vero neutro iure ' tenentur,' sicut illi qui sunt plenae aetatis. Et quibus modis finitur tutela et cura dicetur plenius infra. Item quaedam sunt sub virga, ut uxores, etc.¹

[I. 10. § 3.] Servi autem sub potestate dominorum sunt, nec solvitur dominica potestas quamdiu manentes fuerint in villenagio levantes et cubantes, sive terram tenuerint

¹ The last clause sometimes appears as a rubric.

NOTES.

The first (p. 77) of these paragraphs corresponds to Azo's commentary on Inst. 1. 13, *De tutelis*. Azo does little more than refer us to his larger book. Bracton postpones his treatment of wardship. He cannot speak of wardship until he has spoken of military tenure, socage tenure, and so forth. Here, in order to give the law a Roman look, he suggests, that wardship in chivalry is a *tutela*, while socage wardship is a *curatio*; but he cannot maintain this use of words. Wardship is, in the technical language of our courts, neither *tutela* nor *curatio* but *custodia*.

The title *De tutelis* finished, Azo has to speak briefly (p. 76) of the remaining thirteen titles of the First Book of the Institutes. Bracton refuses to follow him. There is absolutely nothing in them that he can use. They deal for the more part with divers modes of *tutela* and *curatio*; but, as Bracton can at once see, they have no bearing on the English law of wardship. And what could he make of *capitis deminutio*? So, having gone through but the first thirteen out of the twenty-six chapters of the First Book, he must go on to the Second Book and see whether the Roman *ius quod ad res pertinet* is better suited to his purpose than the Roman *ius quod ad personas pertinet*.

Meanwhile it occurs to him that he has not said enough about the English *servi*. He has told us how men become *servi*, and has promised to speak of manumission hereafter; but, without manumission, a *servus* can sometimes gain his freedom. He may acquire a rightful liberty; yet more easily he can acquire a seisin of liberty which is protected by law against his lord's self-help.

The passage that follows (p. 77) is thoroughly English, and comes neither from Justinian nor from Azo. Bracton has an important doctrine to expound, and one which is a fine illustration of the medieval protection of seisin. A fugitive *servus*, though he is still a slave *de iure*, can acquire a possession of liberty. Liberty is conceived as a *res* of which there can be possession. When he possesses this he will be protected against his lord's self-help. In order to gain this *de facto* freedom, it is first of all necessary that the serf should become a fugitive and pass out of his lord's power or seisin, and we must explain that there can be no breach of the lord's seisin so long as the serf is periodically paying chevage—that is, head-money—or habitually returns from his wanderings to his villain tenement: what the Institutes say about the *consuetudo revertendi* of domesticated animals will come in usefully here. But suppose that there is a real flight, then the lord must make fresh pursuit, otherwise the *servus* will be in possession of his liberty. If that possession has once been acquired, the lord must not seize him, nor his children, nor his lands, nor his goods, but must bring an action. Apparently the lord has but four

sive non. item si non¹ manentes in villenagio sed vagantes per patriam, euntes et redeuntes, semper sub potestate dominorum sunt, quamdiu redierint. et cum consuetudinem revertendi habere desierint, incipiunt esse fugitivi, ad similitudinem cervorum² domesticorum. item si cum vagantes fuerint, sicut mercatores vel mercenarii, certis temporibus chevagium solverint,³ quod dicitur recognitio in signum subiectionis et domini de capite suo,⁴ quamdiu chevagium solverint, dicuntur esse sub potestate dominorum, nec solvitur dominica potestas. et cum solvere desierint incipiunt esse fugitivi. et si aliquo praedictorum modorum fugam fecerint, statim persequi⁵ debent, et recentior,⁶ infra tertium diem vel quartum, donec fuerint comprehensi et reducti, ubicumque inventi fuerint. nec debet aliquis eos impedire ratione alicuius libertatis vel privilegii, quia dominus servorum illorum semper retinet dominium, donec illud amittat per negligentiam, vel per violentiam, et iniustam resistentiam, et cui⁷ ille qui persequitur⁸ resistere [f. 7] non possit. tunc oportebit ad superiorem recurrere, ut sibi perquirat per breve. nisi ita sit forte quod ille fugitivus infra annum ad villenagium suum revertatur et a domino comprehendatur et detineatur, quod quidem licite potest facere dominus, quia ante annum completum nullum habere potest privilegium fugitivus. nec etiam si dominus infra annum clamium suum qualitercumque apposuerit, si fugitivus post annum redierit, licite retineri poterit, nec currit tempus contra dominum, cum res per clamium appositum litigiosa efficiatur, et per hoc perpetuetur actio in posterum et elidatur privilegium. Si autem dominus ille negligens extiterit⁹ in persequendo et in clamio apponendo qualitercumque, si fugitivus post annum revertatur, non erit domino licitum nec tutum manum apponere, cum¹⁰ post annum possit fugitivus habere privilegium, et se in statu libero defendere per exceptionem. et sic solvitur dominica potestas.

¹ Insert *sunt* Vulg.² *servorum* Cr. Ed.³ Sic Ed.; omit *solverint* Dig.; *solvunt* Vulg.⁴ Insert *et* Vulg.⁵ *prosequi* Cr. Vulg.⁶ Sic Dig. Corb. Cr.; *petentur* Vulg.⁷ Sic Dig. Cr. Ed.; *et eum* Vulg.⁸ *prosequitur* Vulg.⁹ *fuerit* Vulg.¹⁰ *tamen*, not *cum*, Vulg.

days allowed him for the capture of the runaway, unless, indeed, the serf comes back to the villain tenement. In this last case he can be captured if less than a year has elapsed since his flight, but not if a year has elapsed. For this rule the reason is that by dwelling for a year in a privileged place, that is, on the royal demesne or in a chartered town, the runaway can gain, not merely a seisin of liberty, but full and lawful liberty, and against an action brought by his quondam lord he can defend himself by an *exceptio privilegii*.

According to Bracton the serf who enjoys a possessory protection of his *de facto* freedom, but who still is a serf, is *statuliber*. On the misuse of this Roman term we have commented above (p. 49). Then at the end of the section Bracton introduces us to one whom he calls *statuservus*, who is free in law but serf in fact. If such an one were to infringe an existing seisin by attempting to escape from the power of his would-be lord, he might lawfully be detained. In short, the doctrine which divides possessory from proprietary causes, and which would exclude proprietary defences from possessory actions is to be applied, and applied impartially, to disputes about liberty and serfage. The *statuservus* must remain in the lord's power until his liberty has been proved in an action; the *statuliber* will enjoy freedom until his servility has been demonstrated.

The mention of villains who gain an *exceptio privilegii* turns Bracton's thoughts to the ancient demesne and introduces us to what is in our own day one of the best known passages in his book. He describes the four classes of men who are found on that privileged soil. It would be unnecessary to add in this place to the commentaries that have lately been written on this famous paragraph. It is remote from Azo's text. It may be translated thus:—

In the demesne of our lord the king are divers sorts of men. For there are slaves or born bondmen, who [in the person of their ancestors] were such before the Conquest, at the Conquest, and after the Conquest; and they hold villainages by villain and uncertain services; and to this day they do villain and uncertain services and whatever they are bid, provided it be lawful and right. And there were there at the Conquest free men, who freely held their tenements by free services or free customs; and, when they had been ejected by the stronger folk, they afterwards came back and took these same tenements of theirs in villainage, by doing in respect thereof servile, but certain and specified works. And these men are called *glebae ascripticii*, and, none the less, free men; for albeit they do servile works, still they do these, not by reason of their persons, but by reason of their tenements. Therefore they will not have the assize of novel disseisin (for the tenement is villain, though privileged) nor the assize of mort d'ancestor; but only the little writ of right according to the custom of the manor. And they are called *glebae ascripticii* because they enjoy this privilege, to wit, that so long as they can make the payments due from them, they cannot be removed from the soil (no

Et dicuntur servi esse in statu libero, donec dominus versus eos sibi perquisierit per legem terrae, nec habebit potestatem aliquam in eis vel liberis suis, terris vel aliis bonis ipsorum, donec corpus, quod principale est, disrationaverit, secundum quod inferius dicetur. Cum autem dominus per negligentiam vel impotentiam sui seisinam de fugitivo suo amiserit, si resumptis viribus contra privilegium fugitivum reduxerit, vel cum fugitivus redierit ipsum retinuerit, poenam debitam non evadet, cum hoc sit contra pacem. Infra plus de hac materia, de placito de nativis et fugitivis, qualiter revocantur in servitutem, qui sunt extra potestatem dominorum et in fuga.¹

{² Sed si extra villenagium [³ scilicet, per lapsum trium vel quatuor dierum] inventus fuerit, cum dominus negligens fuerit in prosecutione, capi non poterit nec retineri, non magis quam liber homo, et si fuerit, inde habebit querelam de imprisonment. }

[I. 11. § 1.] In dominico domini regis plura sunt genera hominum. Sunt enim ibi servi, sive nativi, ante conquestum, in conquestu et post, et tenent villenagia et per villana servitia et incerta, qui usque in hodiernum diem villanas faciunt consuetudines et incertas, et quicquid eis praeceptum fuerit, dum tamen licitum et honestum. Fuerunt etiam in conquestu liberi homines, qui libere tenuerunt tenementa sua per libera servitia, vel⁴ liberas consuetudines, et cum per potentiores eiecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servilia, sed certa et nominata. qui quidem dicuntur glebae ascripticii, et nihilominus liberi, quia licet faciant opera servilia, tamen⁵ non faciunt

¹ The last sentence is omitted in many MSS. Sometimes it begins with *Invenies plus de hac materia*, and stands in the margin.

² In the Vulgate this gloss is inserted in the text after *cum hoc sit contra pacem*. It should come a little higher up. It is not in some MSS. It is marginal in Dig. Cr. In Ed. it follows on *elidatur privilegium*. In Reg. it follows *privilegium fugitivus*. In Gl. it follows on *clavium suum qualitercumque apposuerit*. It has all the appearance of being one of Bracton's own marginalia.

³ These words are not in Dig. Ed. Cr. Reg. Gl. Chert., and are of very doubtful authority.

⁴ Insert *per* Vulg.; *et*, not *vel*, Cr. Ed.

⁵ *cum* Vulg

matter into whose hands the king's demesne may come) nor can they be compelled to hold the tenements against their will. Then there is another sort of men in the manors of our lord the king; and they hold [parts] of the [quondam] demesne [lands of the manor] by the same villain customs and services as those by which the aforesaid men [*i.e.* the sokemen] hold; but they do not hold in villainage, nor are they serfs, nor were they serfs at the Conquest like the first-mentioned class; but they hold under some covenant which they have made with their lords, in such wise that some of them have charters and some have not. And, according to some, if these men are ejected from the tenements, they shall recover their seisin by the assize of novel disseisin, and, since they have the novel disseisin, their heirs shall have the mort d'ancestor. [Others hold (see f. 209) that a writ of covenant is the appropriate remedy.] Once more, there are other kinds of men in the king's manors and demesnes, who, as might be the case elsewhere, hold freely and in free socage or by military service by virtue of a modern feoffment made since the Conquest.

ea ratione personarum, sed ratione tenementorum, et ideo assisam novae disseisinae non habebunt, quia tenementum est villenagium, quamvis privilegiatum, sed nec¹ assisam mortis antecessoris, sed tantum parvum breve de recto secundum consuetudinem manerii. et ideo dicuntur glebae ascripticii, quia tali gaudent privilegio, quod a gleba amoveri non poterunt, quamdiu solvere possunt debitas pensiones, ad quoscumque pervenerit dominicum domini regis, {² nec compelli poterunt ad tale tenementum tenendum nisi velint²}. Est et aliud genus hominum in manerio domini regis, et tenent de dominico et per easdem consuetudines et servitia villana per quae supradicti, et non in villenagio, nec sunt servi nec fuerunt in conquestu ut primi, sed per quandam conventionem quam cum dominis fecerunt, et ita quod quidam eorum cartas habent et quidam non, et qui, si³ a talibus tenementis eiecti fuerint, seisinam recuperabunt per assisam (secundum quosdam) novae disseisinae, et cum assisam novae disseisinae habuerint, habebunt heredes assisam mortis antecessoris. [§ 2.] Sunt etiam alia genera hominum in maneriis et dominicis domini regis, qui sicut alibi tenent libere et in libero sokagio et per servitium militare ex novo feoffamento et post conquestum.

[f. 7 b]

[I. 11. § 3.] Item sub potestate dominorum⁴ sunt liberi homines possessi ut servi, et qui aliquando in libertatem proclamant, et qui dici poterunt statuservi, cum sint liberi, eadem ratione qua servi dici poterunt statuliberi cum sint fugitivi et extra potestatem dominorum: de quibus plenius dicetur infra.

¹ *et nec* Cr. Ed.

²⁻² These words are marginal in Dig. Cr. They represent a very early addition, probably made by Braeton.

³ Om. *si* Dig. Cr.; *si* interlined in Ed.

⁴ *Sic* Ed. Cr. Vulg.; *hominum* Dig.

Explicit liber primus. Incipit secundus de rerum divisione et acquisitione [Inst. 2. 1].

Ipse imperator facit continuationem sic dicens — ‘Superiori¹ libro de iure personarum exposuimus, modo ‘videamus de rebus²’—iuxta praemissam notitiam, supra *de iure naturali* § ul. [Inst. 1. 2. § 12]. et quia ‘omnis res per divisionem melius aperitur, rerum divisiones’ et acquisitiones ‘subiciamus. Innuitur autem prima divisio ‘talís, quod rerum aliae sunt in patrimonio, aliae extra. ‘Quae sunt in patrimonio’ patet cuilibet. ‘Extra patrimonium autem dicuntur res sacrae et communes,’ de quibus dicemus infra. Adicio tertium membrum huius divisionis, quia ‘res aliae sunt nec in patrimonio nec extra, ‘ut usus, ususfructus, iter,³ actus, via et aquaeductus,’ ut ff. *de usu. l. l. i.*

[D. 33. 2. 1. Nec usus, nec ususfructus itineris, actus, viae, aquaeductus legari potest, quia servitus servitutis esse non potest: nec erit utile ex senatus consulto quo cavetur ut omnium quae in bonis sint ususfructus legari possit, quia id neque ex bonis neque extra bona sit.]

‘et’ forte ‘ideo non dicuntur istae servitutes in bonis, quia ‘per se sine fundo non possunt alienari,’ ut ff. *de cura. fu. l. iul. scribit* [D. 27. 10. 10], et in. *de usuf. § item finitur, et de servit. § ideo autem* [Inst. 2. 4. § 3; Inst. 2. 3. § 3]. ‘item ‘praediales servitutes per se non censentur, et ideo videntur ‘non esse vel extinctae esse. nam et manica videtur extincta cum ‘accedit vestimento,’ ut in. e. § *si tamen*.

[Inst. 2. 1. § 26. Si tamen alienam purpuram quis intexuit suo vestimento, licet pretiosior sit purpura, accessionis vice cedit vestimento: et qui dominus fuit purpurae adversus eum qui surripuit habet furti actionem et conductionem, sive ipse est qui vestimentum fecit, sive alius. Nam extinctae res licet vindicari non

¹ *Superiore* Inst.

² *rerum* Sp.

³ The editions have *item* or the common abbreviation of it.

[*De rerum divisione.*]

[I. 12. § 1.] ‘Superius dictum est de personis et statu [f. 7 b] hominum et iure personarum, consequenter dicendum erit de rebus per divisionem, quia res per divisionem melius ‘aperiuntur.’ [§ 2.] ‘Rerum autem prima divisio haec est, ‘quod rerum quaedam sunt in patrimonio nostro, et ‘quaedam extra. Quae sunt in patrimonio nostro, satis ‘patebit inferius.¹ Extra patrimonium autem dicuntur res ‘sacrae² et communes. Quaedam vero nec sunt in patrimonio nec extra, sicut iura et servitutes, usufructus, ‘iter³ et actus, via et aquae ductus’ et huiusmodi. ‘et ‘ideo non dicuntur servitutes esse in bonis, quia per se sine ‘fundo alienari non possunt. item praediales servitutes ‘per se non censentur, et ideo videntur non esse, vel ‘extinctae esse,’ si censeantur per se. ‘nam et manica ‘videtur extincta, cum [non⁴] accedit⁵ vestimento, et tignum ‘videtur non possideri, cum⁶ accedit aedificio. sed tamen ‘non dicuntur istae servitutes esse extra bona, cum possidentes exceptionem, et non possidentes habeant actionem.’

[I. 12. § 3.] ‘Fit et alia et secunda divisio rerum, quia ‘aliae sunt corporales, aliae incorporales.’ corporales vero quae tangi possunt, sicut terra, fundus, res immobiles vel res mobiles, quae se movere possunt, sicut animalia et⁷ huiusmodi, vel moveri. incorporales vero sunt sicut sunt iura, quae videri non possunt nec tangi, ut ius eundi, agendi, aquamve ducendi, et huiusmodi quae non possidentur sed quasi.

[I. 12. § 4.] ‘Est et tertia divisio rerum, quod aliae ‘sunt communes, aliae publicae, aliae universitatis, aliae ‘nullius, et aliae singulorum, quae variis ex causis cuique

¹ Our text follows Dig. Corb. Ed. Cr. The Vulgate reads *In patrimonio sunt res tam mobiles quam immobiles, quibus pro voluntate et necessitate nostra uti licet, de quibus satis patebit inferius.*

² Insert *et religiosae* Vulg.

³ *iter* Dig. Cr.; *item* Vulg.

⁴ *Sic* Dig. Corb. Cr. Ed. Reg. Gl. Shep. Chert. Vulg.

⁵ *accedat* Ed. Cr.

⁶ *Sic* Dig. Corb. Cr.; insert *non* Ed. Reg. Gl. Vulg.

⁷ *vel* Vulg.

possint, condici tamen a furibus et a quibusdam aliis possessoribus possunt.]

‘et tignum videtur non possideri cum accedit aedificio,’ ut ff. *de usucap. l. rerum mixtura* [D. 41. 3. 30]. ‘non tamen dicuntur istae servitutes esse extra bona, cum possidentes exceptiones,¹ et non possidentes habeamus actionem,’ ut ff. *de acq. re. do. l. rem in bonis* [D. 41. 1. 52].

‘Fit alia secunda divisio, quod rerum aliae sunt corporales, aliae incorporales,’ ut in. t. i. [Inst. 2. 2]. ‘Fit tertia divisio rerum, quod aliae sunt communes, aliae publicae, aliae universitatis, aliae nullius, aliae singulorum quae variis causis cuique adquiruntur,’ sicut ex subiectis apparebit. ‘Naturali autem iure communia sunt omnium haec: aer et aqua profluens et mare et’ per hoc ‘litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis’ et monumentis ‘et aedificiis abstineat. quia non sunt iuris² gentium communia sicut et mare. immo aedificia in mari vel in litore posita aedificantium sunt, et ita in hoc casu solum cedit aedificio, licet’ aliud sit secundum regulam, ut in. e. § *et naturali*, et § *cum in suo*, ut ff. e. l. *in tantum* [Inst. 2. 1. §§ 1 et 29; D. 1. 8. 6]. Est autem litus maris quatenus hybernus fluctus maximus excurrit, et in eo licet retia siccare et ex mari deducere, ut in. e. § *est autem litus*, et § *litorum* [Inst. 2. 1. §§ 3-5]. ‘Publica autem sunt omnia flumina et portus, ideoque ius piscandi omnibus est commune in portu fluminibusque. Riparum quoque usus publicus est iuris gentium sicut et ipsius fluminis. itaque naves ad eas applicare, funes³ arboribus ibi natis religare, onus aliquod in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. sed proprietates earum est illorum quorum praediis adhaerent: qua de causa arbores in iisdem natae eorundem sunt,’ ut in. e. § *flumina* [Inst. 2. 1. § 2]. Quare autem litora non cedant, sicut et ripae, his qui prope possident, potest quaeri. ‘Sunt autem haec intellegenda de fluminibus perennibus: temporalia enim possunt esse privata,’ ut ff. *de fluminibus*,

¹ *exceptionem* Gonv. Cai.

² *iuris* Gonv. Cai.; *iure* Sp.

³ *jines* Sp.; *funes* Pap. Ven. Gonv. Cai.

‘adquiruntur. [§ 5.] ‘Naturali vero iure communia sunt
 ‘omnium¹ haec: aqua profluens, aer et mare’ ‘et litora
 ‘maris,’ quasi mari² accessoria. ‘nemo igitur³ ad litus
 ‘maris accedere prohibetur, dum tamen villis et aëdificiis
 ‘abstineat, quia’ litora ‘non⁴ sunt iure gentium communia
 ‘sicut et mare. ‘immo⁵ aedificia, si in mari sive in litore
 ‘posita fuerint, aedificantium sunt’ de iure gentium, ‘et ita [f. 8]
 ‘in hoc casu solum cedit aedificio,’ licet alibi contrarium,
 ‘quod⁶ aedificium cedit solo. [§ 6.] ‘Publica vero sunt omnia
 ‘flumina et portus, ideoque ius piscandi omnibus com-
 ‘mune est in portu et in fluminibus. Riparum etiam usus
 ‘publicus et iuris gentium⁷ sicut ipsius fluminis. itaque
 ‘naves ad eas applicare, funes arboribus ibi natis religare,
 ‘onus aliquod in his reponere, cuilibet⁸ liberum⁹ est sicuti
 ‘per ipsum flumen¹⁰ navigare. sed proprietates earum¹¹ est
 ‘illorum quorum praediis adhaerent, et eadem de causa
 ‘arbores in eisdem natae eorundem sunt. Et haec intelle-
 ‘genda sunt de fluminibus perennibus, quia temporalia
 ‘possunt esse privata.¹² Publica autem ita accipiuntur,¹³
 ‘quae sunt omnium populorum, id est, quae spectant ad
 ‘usum hominum tantum. communia vero dici poterunt
 ‘aliquando, quae sunt omnium animantium.’

[I. 12. § 7.] ‘Universitatis vero sunt, non singulorum,
 ‘quae sunt in civitatibus, ut theatrum, stadia et huiusmodi,
 ‘et si qua sunt in civitatibus communia. dicuntur vero
 ‘theatra a theorando, id est inspiciendo. stadium vero
 ‘dicitur octava pars miliarii, quod, ut dicitur, Hercules
 ‘uno anhelitu currebat et postea stabat. Et dicuntur ista
 ‘universitatis dominio et usu. alia¹⁴ autem dicuntur uni-
 ‘versitatis esse non usu, sed dominio et fructu, ut fundi et

¹ *omnia* Vulg.² *maris* Vulg.³ *enim* Vulg.⁴ *Sic* Dig. Corb. Cr. Shep. Chert.; omit *non* Vulg.; the *non* is expuncted in Reg. Gl. Ed.⁵ *Idco* Vulg.⁶ *quia* Vulg.⁷ *Sic* Dig. Corb. Ed. Cr.; *publicus est de iure gentium* Vulg.⁸ *cuius* Vulg.⁹ *libitum* Ed.¹⁰ *fluvium* Vulg.¹¹ *earum riparum* Cr.¹² Vulgate inserts *Nota hic differentiam inter publicum et commune.* Obviously a mere note.¹³ *accipiunt* Vulg.¹⁴ *alia* Dig. Corb. Ed. Cr.; *Usualia* Vulg.!

l. i. § *item fluminum* [D. 43. 12. 1. § 2]. Liquet igitur secundum praedictas divisiones quod nulla communia sunt publica vel e converso, cum sub hoc genere res assignentur velut species pares et coaequae.¹ et ideo mirum est quod dicitur usus litorum publicus, ut in. e. § *litorum* [Inst. 2. 1. § 5]. debuit enim dicere communis, sicut et litus commune est, ut supra dictum est. item publicum dicitur ipsum mare, ut ff. e. l. *sicut*.

[D. 1. 8. 10. Aristo ait, sicut id quod in mare aedificatum sit fieret privatum, ita quod mari occupatum sit fieri publicum.]

Ad hoc respondet P[laentinus] quod omnia communia sunt publica et e converso, set ratione quorundam usuum quae sunt publica non sunt communia et e converso. ut ecce aer, mare et litora maris, flumina etiam communia, et eorundem ripae communia sunt omnium animalium, quia omnia animalia rationalia et irrationalia his vescuntur et utuntur,² abluendo, bibendo et in eis commorando, et similia quae natura exigit faciendo. eadem etiam ista omnia possunt dici publica ratione quorundam usuum qui solis hominibus competunt, puta piscandi et navigandi et retia siccandi et involucria³ reponendi et similia.⁴ portus tamen, ait P[laentinus] esse publicos non communes. 'Publica autem ita accipiuntur quae sunt omnium populorum, id est, quod spectat ad usum hominum tantum.' Alias publicum appellatur quod est in patrimonio huius vel illius populi tantum, ut C. *de sacrosanctis ec. l. ut int.*⁵ [C. 1. 2. 23], ut ager et vinea, et eiusdem populi dicitur publicum quantum ad usum, ut ecce via publica, campus martius. Domino autem meo visum est quod nulla publica sint communia vel e converso. nam ea demum dicuntur communia quae, cum sint in usu⁶ omnium animantium, conceduntur occupanti, sicut patet in litore maris et lapillis et in gemmis et ceteris quae in litore inveniuntur, ut ff. e. *i[tem] lapilli* [D. 1. 8. 3]. Non dicat aliquis hac ratione pro derelicto habita communia

¹ *coequae* Sp.

² *nutriuntur* Cai.

³ *i volucria* Sp.; *in volucria* Pap. Ven.

⁴ Cai.; omit *et similia* Sp. Gonv.

⁵ *Sacrosanctis et ut int.* Sp.

⁶ *in usu* Gonv. Cai.; omit Sp.

'servi¹ civitatum,² qui³ ita sunt omnium civium, ita quod 'nullius' per se. [§ 8.] 'Res vero sacrae, religiosae, et 'sanctae in nullius bonis sunt: quod enim divini iuris⁴ est, 'id in nullius hominis bonis est, immo in bonis dei hominum 'censura.' [§ 9.] Item sunt res singulorum, ut mea et⁵ tua, dominio et usu, sicut fundi, civitates⁶ et servi. Et sunt sacra 'quae rite et per pontifices deo consecrata sunt, 'veluti aedes sacrae et religiosae et dona quae rite ad 'ministerium dei dedicata sunt, ut calices, cruces, et 'turibula, quae alienari prohibentur, excepta causa re- 'demptionis captivorum.' item loca sacra sunt coemiteria et ecclesiae⁷ et capellae, 'et licet aedificia diruantur, adhuc 'locus sacer manet. et differt sacrum a sacrario, quia 'sacrarium dicitur locus ubi sacra reponuntur.' Sacrae⁸ etiam 'res sunt, veluti muri et portae civitatum, et ideo 'dicuntur⁹ sancti quia poena capitalis constituta est in 'eos qui aliquid in muros sanctos delinquunt, violando ali- 'quid in his vel immittendo, vel transcendendo, scilicet 'adhibitis, vel alia qualibet ratione. quia hostile est et 'abominabile alias' ingredi¹⁰ 'quam per portas. dicitur 'enim sanctum quod defensum est et munitum ab iniuria 'hominum, et lex illa specialiter dicitur sanctio quae¹¹ 'poenam imponit' iniurioso. 'muros vero municipales re- 'ficere non licet alicui ad privatum commodum, sed ad 'publicam utilitatem.'

[I. 12. § 10.] 'Res quidem nullius esse dicuntur plu- 'ribus modis: natura,' sive iure naturali, 'ut ferae bestiae, 'volucres et pisces. item censura,' ut dictum est, 'sicut res 'sacrae, religiosae et sanctae. item casu, sicut est here- 'ditas iacens ante aditionem. sed fallit in hoc, quia sus- 'tinet vicem personae defuncti, vel quia sperantur futurae

¹ Insert *id est* Vulg.

² *civitatis* Cr.; *in civitatibus* Ed.

³ *quia* Ed. Cr.

⁴ *Sic* Ed. Cr. Vulg.; *semi iuris* Dig. Corb.

⁵ Omit *et* Dig. Ed. Cr.

⁶ *civitates* Dig. Cr. Reg. Gl. Shep. Chert. Vulg.; *civitat'* Ed.; *civitatum* is wanted.

⁷ *et capellae et ecclesiae* Vulg.

⁸ *Sic* Dig. Ed. Cr. Reg. Gl. Shep. Chert. Vulg.; *Sanctae* Azo.

⁹ Insert *muri* Vulg.

¹⁰ *ingredi* Dig. Ed. Cr. Vulg.; *egredi* Azo.

¹¹ *quae* Dig. Ed. Cr.; *quia* Vulg.

esse, quia licet concedantur occupanti non tamen sunt in usu omnium animantium. Publica autem nedum non conceduntur occupanti, set etiam interdicta proponuntur contra eum qui aliquid fecit in eis in laesionem publicam, ut ff. *ne quid in loco publico* [D. 43. 8] et *de flumi. ne quid in flumine publico* [D. 43. 12]. nec obstant his quae dicta sunt, quia alias dicuntur litora populi Romani esse, ut ff. *ne quid in loco publico l. litora* [D. 43. 8. 3]. sunt tamen¹ populi Romani quantum ad iurisdictionem, vere² communia sunt omnium animalium, ut dictum est. non tamen licet in litore aedificare si usus publicus impediatur ex eo, ut ff. *ne quid in lo. pu. l. respondendi*³ [D. 43. 8. 4].

‘Universitatis sunt non singulorum veluti quae in civitatibus sunt, ut theatra, a theorando, id est, inspicendo,’ ut in arena Veronensi, ‘et stadia et his similia, et si quae alia sunt communia civitatum. dicitur autem stadium octava pars miliarii quod, ut historiace fertur, Hercules uno anhelitu currebat et postea stabat. Dicuntur ista universitatis dominio et usu,’ ut ff.⁴ *ne quid in lo. pu. l. ii. § ait praetor in via*.

[D. 43. 8. 2. § 20. Ait praetor : In via publica itinereve publico facere immittere quid, quo ea via idve iter deterius sit fiat, veto.]

licet Pla[centinus] dixerit esse universitatis usu tantum et non dominio. ‘Alia autem dicuntur universitatis non usu sed dominio et fructu, ut fundi et servi civitatum, quae ita sunt omnium civium⁵ quod nullus,’⁶ ut ff. *de in ius vo. l. sed si hac lege § qui manumittitur*, et ff. *de ver. sig. l. inter publica*.

[D. 2. 4. 10. § 4. Qui manumittitur a corpore aliquo vel collegio vel civitate, singulos in ius vocabit : nam non est illorum libertus. sed reipublicae honorem habere debet, et si adversus rempublicam vel universitatem velit experiri, veniam edicti petere debet,

¹ sunt tamen Ven. ; sunt enim Gonv. Cai.

² Gonv. Cai.

³ Corr. respondit ; respondi Gonv. Cai.

⁴ Omit ff. Sp.

⁵ civitatum Cai.

⁶ nullus [his uti possit] Bas.

‘heredis¹ qui adibit. Dicuntur etiam res in nullius bonis
 ‘esse quae habitae sunt pro derelicto. item tempore
 ‘dicuntur res nullius esse,² ut thesaurus.’ item ubi non
 apparet dominus rei, sicut de wrecco maris. item de his
 quae pro weyvio habentur, sicut de averiis, ubi non apparet
 dominus, et quae olim fuerunt inventoris de iure naturali,
 iam³ efficiuntur principis de iure gentium. ‘Item sunt
 ‘res natura nullius, ubi natura non patitur, quod possint⁴
 ‘esse alicuius, sicut sunt liberi homines. liberi enim [f. 8 b]
 ‘homines exempti sunt a dominio et commercio, et illud
 ‘idem dici poterit in⁵ servo aegrotante, quem dominus
 ‘abiecit. lex enim’ facit ‘ei ut sit liber.’⁶

NOTES.

Having passed by the last thirteen titles of the First Book of the Institutes, Bracton now turns to Azo's comment on the Second Book, and for a while his text consists almost entirely of Azonian sentences. These he extracts from their context in a somewhat haphazard fashion, and it is but too clear that he does not fully understand the subtle discussions in which his Italian guide is engaged.

The Institutes tell us that things are either *in patrimonio nostro* or *extra patrimonium nostrum*. Azo argues at some length that there are some things—namely, usufructs, rights of way, and other servitudes—which are *nec in patrimonio nec extra*. Bracton endeavours to repeat the argument. Azo urges, among other considerations, that praedial servitudes are not separately perceived (*per se non censentur*). Just so a sleeve ceases to have a separate existence when it becomes part of a coat, and a beam when it is built into a house. Whether Bracton understood all this is doubtful. The Vulgate text reads:

Nam et manica videtur extincta cum *non* accedit vestimento,
 et tignum videtur non possideri cum *non* accedit aedificio.

The word *non* should be struck out from this passage in each of the two cases in which we print it in italics, if Bracton is to say what Azo said. Authority for an omission of the second *non* has been found, but not for an omission of the first. It is painfully evident that, if

¹ Sic Dig. Ed. Reg. Shep.; *speratur futura hered'* Chert.; *speratur futura hereditas* Gl. Vulg.

² *et iam* Ed.; omit *iam* Cr.

³ *in* Dig.; *de* Ed. Cr. Vulg.

⁴ *res in nullius bonis esse* Vulg.

⁵ *possent* Vulg.

⁶ *ut liber sit* Ed. Cr.

quamvis actorem eorum constitutum in ius sit vocaturus.

D. 50. 16. 17. Inter publica habemus non sacra nec religiosa nec quae publicis usibus destinata sunt : sed si qua sunt civitatum velut bona. sed peculia servorum civitatum procul dubio publica habentur.]

‘Nullius¹ autem sunt res sacrae et religiosae et sanctae : quod enim divini iuris est id nullius hominis in bonis est, immo est in bonis dei hominum censura. sunt autem sacra quae rite et per pontifices deo consecrata sunt, veluti aedes sacrae et dona quae rite ad ministerium dei dedicata sunt, ut cruces et turibula, quae etiam alienari prohibentur, excepta causa redemptionis captivorum.’ si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est sed profanum. ‘Sacer autem locus remanet sacer etiam diruto aedificio,’ ut in. e. § *nullius* [Inst. 2. 1. § 8]. desinere tamen potest esse sacer si capiatur ab hostibus, ut ff. *de relig.* l. *cum loca* [D. 11. 7. 36]. ‘et differunt sacra² a sacrario. est enim sacrarium locus in quo sacra reponuntur,’ et solent qui liberare eum locum religione volunt,³ sacra inde evocare. Licet autem privatorum res fieri possint sacrae, locus tamen publicus fit sacer tunc demum cum princeps eum dedicavit vel dedicandi dedit potestatem, ut ff. e. l. *loca sacra* [D. 1. 8. 9. § 1]. imperatores enim antiquitus erant sacerdotes, ut fertur in canonibus, et ideo poterant dedicare. vel dic, dedicavit cum prius hoc fieri postulavit, et ideo dicitur fecisse quod fecit per alium. ⁴ dedicandi dedit potestatem requisitus ab aliò cui hoc facere permisit. Religiosus autem locus quis sit, dic ut notavi in summa C. *de relig.* § *est autem locus* usque ad illum § *pro mortuo*.

[Azonis Summa C. 3. 44. Est autem locus religiosus in quo aliquis est sepultus etiam si servus sit. . . .] ‘Sanctae autem res sunt veluti muri et portae. et ideo dicuntur sancti quod poena capitis constituta sit in eos

¹ Insert *hominis* Cai.

³ *vellent* Cai.

² *differt sacrum* Gonv. Cai. Bas.

¹ Insert *vel* Bas

Bracton knew what he was about, his copyists were quite unable to understand the Azonian argument.

Passing by the distinction between corporeal and incorporeal things, we come to the *res* which are *publicae* and the *res* which are *communies*, and we here find that some very strange blunder has been made over a passage in which there is talk of the sea-shore. We can best display it by printing a text from the Institutes, and showing how this text appears in Azo's Summa, and in the Digby MS. of Bracton.

Inst.	Et	quidem	naturali		iure	communis	sunt	omnium	haec :
Azo			Naturali	autem	iure	communis	sunt	omnium	haec :
Digby MS.			Naturali	vero	iure	communis	sunt	omnium	haec

Inst.	aer	et	aqua	profuens		et	mare	et	per	hoc	litora	maris
Azo	aer	et	aqua	profuens		et	mare	et	per	hoc	litora	maris
Digby MS.			aqua	profuens	aer	et	mare	et			litora	maris

Inst.					Nemo	igitur	ad	litus	maris	accedere
Azo					Nemo	igitur	ad	litus	maris	accedere
Digby MS.	quasi	maris	accessoria.		Nemo	igitur	ad	litus	maris	accedere

Inst.	prohibetur,	dum	tamen	villis	et	monumentis	et	aedificiis	abstineat,
Azo	prohibetur,	dum	tamen	villis	et	monumentis	et	aedificiis	abstineat,
Digby MS.	prohibetur,	dum	tamen	villis			et	aedificiis	abstineat,

Inst.	quia		non	sunt	iuris	gentium,		sicut	et	mare.
Azo	quia		non	sunt	iuris	gentium	communis,	sicut	et	mare.
Digby MS.	quia	litora	non	sunt	de iure	gentium	communis,	sicut	et	mare.

It will be seen that the introduction of *litora* as a subject for *non sunt* makes nonsense of the whole passage. Nevertheless, this is the reading of some of the best MSS. Then we come upon others in which the *non* which stands between *litora* and *sunt* is marked for omission by subjacent dots, and finally the *non* disappears from the Vulgate text. At present it looks as if Bracton had inserted *litora* and retained *non*. In that case, he must in all probability be accused of unintelligent haste. He has just said that the *litora maris* are *naturali iure communis omnium*. He now says *litora non sunt de iure gentium communis*. A suggestion that he intended to contrast the *ius naturale* with the *ius gentium* would leave his reasoning unexplained. No one, provided that he does no harm to houses or the like, is to be restrained from access to the sea-shore, *because* the sea-shore is *not* common *de iure gentium*. The omission of that *not* was a tempting emendation. On the other hand, if we suppose that Bracton himself did not write the *non*, we shall be breaking a sound canon of criticism, which teaches us that the MS. which makes Bracton look most like Azo is the best MS., for Azo and the Institutes have got that *non*. (See Stuart Moore, *History of the Foreshore*, p. 32.)

We then (p. 87) have further remarks about things that are 'common' and things that are public, and these remarks are Azonian. Azo, however, has plunged into a long controversy as to the true dis-

‘qui aliquid in muros sanctos¹ deliquerant violando,² aliquid ‘in his³ immittendo vel transcendendo scalis admotis⁴ ‘vel qualibet alia ratione. nam ‘cives Romanos ‘aliter ‘quam per portas’ egredi non licet, cum illud ‘hostile et ‘abominandum sit.’ nam et Remus frater Romuli occisus traditur ob id quod murum transcendere voluerit. unde Lucanus *Fraterno primi maduerunt sanguine muri*. ‘dicitur ‘ergo sanctum quod defensum est et munitum ab iniuria ‘hominum. lex enim illa specialiter dicitur sanctio quae ‘imponit poenam,’ ut in. e. § *sanctae*, et ff. e. l. *sanctum est* in prin. et § *ul. et l. ul.* [Inst. 2. 1. § 10; D. 1. 8. 8 pr. et § 2; D. 1. 8. 11]. dicitur etiam quandoque sanctio quaelibet imperialis constitutio, quandoque etiam dicitur collectio totius iuris, ut in proemio digestorum in prin. et C. *de no. co. fa.* ibi *colligentes vero* etc. [Dig. *de confirmatione digestorum*, Const. *Tanta*, in prin.; C. *de novo cod. compon.* § 2]. muros etiam municipales non licet reficere sine principis vel praesidis auctoritate, nec aliquid eis coniungere vel supponere,⁵ ut ff. e. l. *saera* § *muros* [D. 1. 8. 9. § 4]. et forte non licet privato, licet autem universitati, ut C. *de aedifi. pri.* l. *omnes* [C. 8. 11 (12). 12⁶], vel non licet privato ad commodum suum, licet autem ad publicam utilitatem. Legati etiam dicuntur sancti a sacgminibus. sunt autem sacgmina herbae quaedam quas legati⁷ populi Romani ferre solent ne quis eos violaret, sicut legati Graecorum ea quae vocant cericia, ut ff. e. l. *sanctum* [D. 1. 8. 8. § 1]. homines etiam dicuntur sancti a sanctitate. Ei autem quod dictum est nullius esse res sacras et religiosas, videtur esse contraria regula quae est in. e. ti. § *ferae* [Inst. 2. 1. § 12]. sic enim dicit—quod autem est nullius, occupanti conceditur. ad quod ita respondeo: ‘Res dicuntur nullius pluribus modis: natura, ut ferae ‘bestiae et volucres et pisces,’ et in illis locum habet regula:

¹ *muros communes* Cai.

² *violando* Ven. Gonv. Cai.; *violandos* Pap.; *violanda* Sp.

³ *eos* Cai.

⁴ *amotis* Sp.

⁵ *superponere* Digest.

⁶ The title *de aedificiis privatis* [8. 10] seems to have no law beginning with *omnes*; apparently Azo's reference should be to the neighbouring title *de operibus publicis*.

⁷ Gonv. Cai.; omit *legati* Sp.

inction between *res communes* and *res publicae*. A difficulty is forced upon the reader of the Institutes. He is told (2. 1. § 1) that *litora maris* are *communis naturalis iure*, and then (§ 5) he reads ‘*litorum quoque usus publicus iure gentium est.*’ Azo is for a heroic measure; he would strike out *publicus* in this last passage and substitute *communis*. His own opinion is that no *res communis* is a *res publica*. We have here to deal with two co-ordinate and mutually exclusive species of things. Placentin, on the other hand, had maintained that *res communes* are *publicae* and that *res publicae* are *communes*, but that a distinction arises when we consider the uses to which these things can be put. We call things *communes* when they can be used by all animals; *publicae* when they can only be used by men. Thus beasts can use the sea-shore, but only men can use a harbour. Bracton snatches up a few words out of Azo’s account of Placentin’s doctrine. ‘Common’ things belong to all animals; public things to all people (*omnium populorum*), since they are only useful to men. But Azo goes on to give the opinion of his own master, Johannes Bassianus. *Res communes* and *res publicae* are mutually exclusive classes of things, and the distinction between them turns on the right to appropriate by occupation. I may appropriate the *res communis*, but I may not appropriate the *res publica*. Bracton, with little care for the controversy, seizes a sentence which expresses a theory that Azo has condemned.

We turn to the *res universitatis*. Bracton (p. 87) continues to follow Azo. Azo divides *res universitatis* into two classes. Some things belong to a corporation *dominio et usu*, others belong to it *dominio et fructu*. The former consist—if we suppose the *universitas* to be a *civitas*—of those things which belong to the city and may be used by all the citizens: as, for example, the *stadium* and the *theatrum*. The latter consist of those things which belong to the city but cannot be used by the citizens in common: as, for example, the slaves or the lands (*fundi*) which the city owns. Of these the citizens get the profit, but not the use—‘*ita sunt omnium civium ut nullius*’: they belong to all the citizens, but in such a way that they belong to none of them. It has been remarked that Azo is but at the beginning of the modern learning of corporations; he seems to think that *res civitatis* must in some sense be *res omnium civium*. (See Gierke, *Das deutsche Genossenschaftsrecht*, iii. 211.)

After a word (p. 89) about *res sacrae, religiosae et sanctae*, Bracton has (p. 89) a curious sentence of his own, which in the Vulgate version runs thus: ‘*Item sunt res singulorum, ut mea et tua, dominio et usu, sicut fundi civitates et servi.*’ We might conjecture that the last five or last eight words (for *civitates* we must read *civitatum*) have been negligently copied from the preceding paragraph; but the corruption is of very ancient date, and the MSS. that have been examined give us little help. Perhaps, then, the sentence should end with *usu*, and it would then mean:—‘Again, there are things belonging to

‘censura, ut res sacrae et religiosae et sanctae,’ quae non sunt hominis privati vel universitatis vel publicae sed sunt in bonis dei hominum censura, ut dictum est, et in illis deficit regula: ‘casu’ etiam dicitur res nullius, ut ecce aliquo mortuo ‘res hereditariae ante aditam hereditatem’ in nullius bonis sunt, et ‘in illis deficit regula, vel quia hereditas ‘sustinet vicem personae defuncti vel quia sperantur ‘futuræ’¹ heredis qui adibit. Dicuntur etiam res nullius ‘et’² quae pro derelicto habitae sunt,’ et in illis locum habet regula, ut ff. *pro derelicto* l. i. [D. 41. 7. 1]. ‘Tempore etiam dicuntur res nullius, ut thesaurus.’ est enim thesaurus vetus quaedam depositio pecuniae cuius memoria non exstat, ut iam non habeat dominum, ut ff. *de aequi. re. do.* l. *nunquam* § 1 [D. 41. 1. 31], et in eo locum habet regula, quia conceditur occupanti vel inventori, licet de aequitate teneatur domino soli dare dimidium, ut in. e. § *thesauros* [Inst. 2. 1. 39]. Praeter hoc sciendum est quod deficit regula in his quae adeo ‘natura’³ sunt nullius, ut ‘etiam natura non patiatur quod possunt esse alicuius, ut ‘liberi homines. sunt enim exempti ab alicuius dominio ‘et commercio,’ ut. ff. *de rer. ob. l. inter stipulationem § sacram* [D. 45. 1. 83. § 5]. ‘item deficit regula in servo ‘aegrotante quem dominus abiecit. lex enim’ favet ‘ei ut ‘sit liber.’

¹ speratur futuri Cai.

² ut Gony. Sp.

³ quae adeo natura Gony.; qua adeo naturaliter Cai.; adeo quae natura Sp.; quae adeo nata Bas.

'individuals, such as mine and thine, and these belong to them both 'in ownership and in use.'

We return to *res sacrae*. Bracton blunders over the distinction between *sacer* and *sanctus*, which has disappeared from the current Latin of his time. He makes the walls of a town *res sacrae* instead of *res sanctae*.

The next paragraph (§ 10) begins with excerpts from Azo; but here again it is difficult to acquit Bracton of having written nonsense. Azo, having said that *res sacrae et religiosas* are *nullius in bonis*, raises a difficulty. The Institutes lay down a certain rule (*regula*) about *res nullius*: namely, 'quod enim ante nullius est, id naturali ratione occupanti conceditur'; but we cannot apply this rule to the *res sacrae et religiosas*; they cannot be appropriated by *occupatio*. So we must distinguish. Things are *res nullius* (i.) by nature: such is the case of wild beasts, and here our rule holds good; or (ii.) by construction of law (*censura*): such is the case with the *res sacrae et religiosas*, and to these our rule is not applicable; or (iii.) by accident: such is the case where there is a *hereditas iacens*, and here again the rule is not applicable, either because the *hereditas* itself is deemed to represent the *persona* of the dead man, or because the law waits for and expects the advent of an heir; or (iv.) in consequence of dereliction, and here our rule holds good; or (v.) in consequence of lapse of time, as in the case of treasure trove, and here our rule holds good, though equity compels the finder to pay half the value of the treasure to the owner of the land on which it is found. Now Bracton tries to enumerate the various kinds of *res nullius* without mentioning the rule 'occupanti conceditur.' When, however, he comes to the third example, that of the *hereditas iacens*, he tells us that in this case something or another *fallit*. What is it that fails? If we had only his text before us we could not answer this question. What fails is that rule 'occupanti conceditur,' which he has never mentioned. That he should blunder over this matter is not unnatural, for what does English law know of the *hereditas iacens*?

Bracton for a moment departs from Azo in order to say (p. 91) that there are certain things 'quae olim fuerunt inventoris de iure 'naturali,' but which nowadays 'efficiuntur principis de iure gentium.' It is not perfectly plain whether he intends this to apply only to the last class of *res nullius* that he has here mentioned—namely, waif and stray—or to other classes. Probably he meant it to apply to waif, stray, wreck and treasure trove; and, as we shall see below (p. 99), he comprehends wild beasts in the same doctrine.

Superest ut videamus de acquisitione domini rerum. 'Adquiruntur autem dominia rerum, non iure naturali, sed 'gentium vel civili.' civili, multis modis, ut usucapione, praescriptione, arrogatione, monachatione, deportatione, testamento, successione, bonorum possessione, aditione. de quibus modis, licet non omnibus, tractabitur infra. 'Com- 'modius est autem a vetustiore incipere,' id est, a naturali, quod dicitur gentium, 'quod cum ipso genere humano 'rerum natura prodidit. civilia enim iura tunc coeperunt 'cum et civitates condi et magistratus creari et leges scribi 'coeperunt,' ut in. e. § *singulorum* [Inst. 2. 1. § 11]. 'Iure 'igitur gentium dominia adquiruntur nobis multis modis. 'ut ecce in primis per occupationem eorum quae non sunt 'in bonis alicuius,' 'ut sunt ferae bestiae et volucres et 'pisces, id est, omnia animalia quae in terra et mari et 'caelo, id est, in aere nascuntur,' sive capiat quis in suo sive in alieno. dominus tamen fundi si viderit, poterit prohibere ingredientem venandi aut aucupandi gratia, et si prohibitus fueris teneris iniuriarum, nisi ingrediaris glandis legendae causa tertio quoque die, vel nisi ingrediaris causa pecuniae tuae in alieno absconditae, ubi tamen iures primum te non calumniandi animo effodere, tollere, exportare, ut ff. *de glande le.* l. i. et *ad exhibendum* l. *thesaurum*, et *de act. emp.* l. *qui pendentem* [D. 43. 28. 1; D. 10. 4. 15; D. 19. 1. 25]. 'et qua ratione captum incipit esse meum 'quia mea custodia coercetur, eadem ratione si evaserit 'custodiam meam et in naturalem libertatem se receperit, 'desinit esse meum et rursus fit occupantis. recipit autem 'naturalem libertatem cum vel oculos meos effugerit in 'aere libero, non sub cappa¹ mea, vel ita sit in conspectu' ut difficilis, id est, 'impossibilis sit eius persecutio,' ut in. e. § *ferae igitur* [Inst. 2. 1. § 12]. 'Continet igitur occupatio 'piscationem et venationem et apprehensionem. sola enim 'persecutio non facit rem esse meam. nam si feram 'bestiam ita vulneraverim ut capi possit, non tamen

¹ *cappa* Gon.; *capa* Cai.

[II. 1. § 1.] Dictum est supra de rerum divisione. ‘nunc [f. 8b]
 ‘autem dicendum est qualiter dominia rerum adquiruntur,’
 ‘de iure naturali sive gentium, ut a vetustiore iure incipia-
 ‘tur, quod cum ipso genere humano rerum natura pro-
 ‘didit, et post dicendum erit de iure civili, quod postea
 ‘esse coepit,¹ cum et civitates condi et magistratus creari
 ‘et leges scribi coeperunt.’ [§ 2.] ‘Iure autem gentium’
 sive naturali ‘dominia rerum adquiruntur multis modis.
 ‘Inprimis per occupationem eorum quae non sunt in bonis
 ‘alicuius,’ et quae nunc sunt² ipsius regis de iure civili
 et non communia ut olim: ‘sicut sunt ferae bestiae,
 ‘volucres et pisces, id est,³ omnia animalia quae in terra
 ‘et in mari et in coelo, id est,⁴ in aere nascuntur, ubi-
 ‘cumque capiantur,’ ‘et cum capta fuerint, incipiunt esse
 ‘mea, quia mea custodia coercentur. et eadem ratione, si
 ‘evaserint custodiam meam et in naturalem libertatem se
 ‘receperint, desinunt esse mea et rursus fiunt occupantis.
 ‘recipiunt autem naturalem libertatem tunc, cum vel oculos
 ‘meos effugerint in aere libero et non sub capa⁵ mea, vel
 ‘ita sunt in conspectu meo ut impossibilis sit eorum perse-
 ‘cutio.’ [§ 3.] ‘Item continet occupatio piscationem,
 ‘venationem, et apprehensionem. et nec sola persecutio
 ‘facit rem esse meam. nam etsi feram bestiam vulne-
 ‘raverim ita ut capi possit, non tamen est mea, nisi⁶
 ‘cepero, immo erit posterius⁷ occupantis, quia multa acci-
 ‘dere solent ne capiam. item si in laqueum, quem venandi
 ‘causa tetendi⁸ aper inciderit, et cum coererem⁹ eum
 ‘exemptum abstuli, erit meus, si in potestatem meam
 ‘pervenerit,’ nisi consuetudo vel privilegium se habeat in
 contrarium. ‘Continet etiam occupatio inclusionem ut in
 ‘apibus quarum fera est natura. nam si in arbore mea

¹ ceperunt Dig.² quae non sunt Cr.³ et, not id est, Vulg.⁴ et, not id est, Vulg.⁵ captura Vulg.; capta with t expuncted Cr.⁶ Insert eam Vulg.⁷ posterius Dig. Azo; potius Corb. Ed. Cr. Vulg.⁸ tetendit Dig. Corb. Cr. Reg.; tetendit with last t erased Ed.; tetendi Shep. Chert. Vulg.; tetendisti is desirable.⁹ cohercerem Dig. Ed. Gl. Reg.; cohercionem Corb. Cr. Shep.; coertione Vulg.; cohaeret is desirable.

‘est mea nisi cepero, immo erit posterius occupantis, quia
 ‘multa accidere solent ne capiam,’ ut in. c. § *illud quaesitum*
 [Inst. 2. 1. § 13]. ‘et hoc est adeo verum ut si in laqueum
 ‘quem venandi causa posueras¹ aper incidit, et cum
 ‘cohaeret² exemptum³ eum abstuli, fit meus si in potesta-
 ‘tem meam pervenerit,’ ut ff. *de adq. re. do.* l. *in laqueum.*

[D. 41. 1. 55. In laqueum, quem venandi causa
 posueras, aper incidit: cum eo haereret exemptum
 eum abstuli, num tibi videor tuum aprum abstulisse?
 et si tuum putas fuisse, si solutum eum in silvam
 dimissem, eo casu tuus esse desisset an maneret?
 et quam actionem mecum haberes si desisset tuus
 esse, num in factum dari oporteret, quaero. Respondit:
 laqueum videamus ne intersit in publico an in privato
 posuerim, et, si in privato posui, utrum in meo an in
 alieno: et si in alieno, utrum permissu eius cuius
 fundus erat an non permissu eius posuerim: praeterea
 utrum in eo ita haeserit aper ut expedire se non possit
 ipse, an diutius luctando expediturus se fuerit. Sum-
 mam tamen hanc puto esse, ut, si in meam potestatem
 pervenit, meus factus sit. sin autem aprum meum
 ferum in suam naturalem laxitatem dimisisses et eo
 facto meus esse desisset, actionem mihi in factum dari
 oportere, veluti responsum est cum quidam poculum
 alterius ex nave eiecisset.]

Consuetudo tamen generalis in eo repugnat. Continet
 etiam occupatio ‘inclusionem ut in apibus quarum est fera
 ‘natura. nam et si in arbore mea consederint, non tamen
 ‘magis⁴ sunt meae antequam a me alveo includantur,
 ‘quam volucres quae in arbore mea fecerunt nidum,
 ‘ideoque si alius incluserit eas, earum dominus erit.’
 favos etiam si quos effecerint quilibet eximere potest, licet
 integra re si providero ingredientem prohibere possim.
 ‘Examen quod ex alveo meo evolaverit eo usque meum
 ‘esse intellegitur donec est in conspectu, nec est’ difficilis

¹ *posuerā* Sp. Pap. Ven. Bas.; *posueras* Gonv. Cai. Y. Z.

² *coereeret* Gonv.; *coheretur* Cai.; *eo haereret* Bas.

³ Owing to the loss of a folio Gonv. becomes useless at this point.

⁴ Omit *magis* Sp. Pap. Ven.; *non magis* Cai.

consederint, non magis sunt meae antequam a me alveo
 ‘includantur, quam volucres quae in arbore mea fecerint
 ‘nidum, et ideo si alius incluserit eas, earum dominus erit.
 ‘examen etiam quod ex alveo meo evolaverit, eo usque
 ‘meum esse intellegitur quamdiu in conspectu meo est,
 ‘nec sit’ impossibilis ‘eius persecutio, alioquin occupantis
 ‘sit.¹ sed si quis illud ceperit, suum non facit, si sciverit
 ‘ipsum² alienum, sed furtum facit, nisi animum habeat [f. 9]
 ‘restituendi.’ Et haec vera sunt, nisi aliquando de con-
 ‘suetudine in quibusdam partibus aliud fiat. [§ 4.] ‘Haec
 ‘quae dicta sunt locum habent in animalibus quae omni
 ‘tempore fera permanserunt. si autem animalia fera facta
 ‘fuerint mansueta et ex consuetudine eunt et redeunt,
 ‘volant et revolant, ut sunt cervi,³ pavones,⁴ et columbae,⁴
 ‘alia regula comprobata est, ut eo usque nostra intelle-
 ‘gantur quamdiu habuerint animum revertendi. nam si
 ‘revertendi animum habere desierint, nostra desinunt esse.
 ‘revertendi autem animum videntur desinere habere cum
 ‘consuetudinem revertendi deseruerint. idemque dicitur
 ‘de gallinis et anseribus feris factis⁵ mansuetis. In
 ‘domesticis vero tertia regula comprobata est, quod licet
 ‘conspectum meum effugerint anseres mansueti et gal-
 ‘linae, quocumque tamen loco sunt, mei esse intelleguntur,
 ‘et furtum facit, qui ea animo lucrandi retinuerit. Habet
 ‘etiam locum ista species occupationis in his quae ab
 ‘hostibus capiuntur, ut si liberi homines in servitutem
 ‘nostram deducantur, et⁶ potestatem nostram evaserint,
 ‘pristinum statum recipiunt. Item locum habet eadem
 ‘species occupationis in his quae communia sunt, sicut
 ‘in mari et litore maris, in lapillis et gemmis et ceteris
 ‘in litore maris inventis. idem etiam in insulis in mari
 ‘natis, et in similibus, et in rebus pro derelicto habitis,
 nisi consuetudo se habeat in contrarium propter fisci
 privilegium.

¹ Sic Dig. Ed. Cr. Vulg.; fit Azo.

² Insert esse Vulg.

³ Insert *cygni* Vulg.; *cygni* in margin Ed.

⁴ Insert et *huiusmodi* Vulg.

⁵ Insert *ex* Vulg.; omit Dig. Corb. Ed. Cr.

⁶ Omit *et* Dig., where *postea* is written but expuneted.

‘ eius persecutio, alioquin oocupantis fit. ergo si quis alius
 ‘ interim ceperit, suum non facit, immo, si seivit alienum,
 ‘ furtum facit, nisi animo restituendi ceperit,’ ut in. e.
 § *apium* et § *examen* [Inst. 2. 1. 14]. ‘ Haec quae dieta
 ‘ sunt locum habent in animalibus quae natura sunt fera.¹
 ‘ si autem animalia fera facta sunt² mansueta et ex
 ‘ consuetudine eunt et redeunt, volant et revolant, ut sunt
 ‘ eervi, pavones et columbae, alia regula comprobata est,
 ‘ ut eo usque nostra intellegantur donec habent animum
 ‘ revertendi. nam si revertendi animum habere desierint,³
 ‘ nostra desinunt esse. revertendi autem animum videntur
 ‘ desinere habere cum revertendi consuetudinem deseru-
 ‘ erunt. idemque dicitur in gallinis et anseribus feris
 ‘ factis mansuetis. In domesticis enim tertia regula com-
 ‘ probata est, ut licet conspectum meum effugerint, quo-
 ‘ cumque tamen loco sint, mei anseres vel gallinae intel-
 ‘ gantur, et qui luerandi animo ea⁴ animalia retinet,
 ‘ furtum committit,’ ut insti. e. § *pavonum* et § *gallarum*
 [Inst. 2, 1. §§ 15. 16]. licet enim actio de dolo non habeat
 locum in re modica, quia est odiosa et subsidiaria, ut ff. *de*
dolo l. *si oleum* § *ul.*

[D. 4. 3. 9. § 5. Merito causae cognitionem praetor
 inseruit: neque enim passim haec actio indulgenda
 est. nam eae in primis si modica summa sit, [l. 10]
 id est usque ad duos aureos.]

actio tamen furti datur pro qualibet gallina. huius autem
 tertii generis animalia amittuntur modis consuetis, si
 dominus alienaverit vel in testamento reliquerit. ‘ Habet
 ‘ etiam locum ista species occupationis in his quae ab
 ‘ hostibus capimus, adeo quidem ut et liberi homines in
 ‘ servitute nostram dedueantur, qui tamen si evaserint
 ‘ nostram potestatem ’ et ad suos fuerint reversi, ‘ pristinum
 ‘ statum recipiunt,’ ut in. e. § *item ea* [Inst. 2. 1. § 17].
 ‘ Item eadem species locum habet in his quae communia
 ‘ sunt, ut in mari et litore maris et lapillis et gemmis et
 ‘ ceteris quae in litore inveniuntur,’ ut in. e. § *item lapilli*

¹ quae manserint fera Cai. : manserunt fera Bas.

² fuerint Cai. Bas.

³ desierunt Sp. Bas.

⁴ Cai; m it ea Sp. Bas.

NOTES.

According to our Vulgate text Bracton here begins his *Liber Secundus*, but the best MSS. make no division at this point, and we are here in the very middle of a title (2. 1. § 11) of the Institutes.

Bracton begins by a statement which seems to override all the law about wild beasts that he is going to copy from Azo. Those things which are not owned by anyone, and which by natural law could be appropriated by *occupatio*, belong now to the king, and cannot be appropriated. It is well known that about the law of Bracton's age concerning wild animals various opinions have prevailed. It is very hard to read his text without believing him to hold that, if franchises conceded by the king be left out of account, every wild animal, bird, fish, belongs to the king. He draws no distinction between beasts of the chase and other beasts. With Azo's text before him, and fully aware that he is contradicting 'the law of nature,' he holds that wild beasts belong to the king. Does he really mean to say that the king is the owner of the field-mice and the sparrows; that if a man kills an adder the dead body belongs to the king? He might reply, '*De minimis non curat lex*'; but apparently the royal claim to beasts of the chase has been pressed so far that he can find no warrant for it except the enormous doctrine here stated. This stated, however, he is content to copy from Azo some of those rules of natural law which have now given way to this wonderful *ius civile*, and which may hold good in England subject to royal rights.

The sentence about the wild boar (p. 99) is difficult. It takes us back to a passage in the Digest which has been given in full above (p. 100). A case is put to Proculus: You have set a snare; a boar has been caught in it; I find the boar in the snare and take it. Have I taken your boar? Proculus in his answer supposes himself to be the setter of the snare. The form of this passage, that of question and answer, seems to have given trouble. Azo writes: '*Si in laqueum quem venandi causa posueras [al. posueram] aper ineidit et cum cohaeret exemptum eum abstuli, fit meus si in potestatem meam pervenerit.*' This (but the variant will be noticed) seems to mean: If you set the snare and I take the boar out, the boar becomes mine so soon as it is in my power. Then, however, Azo remarks that a general custom rejects this doctrine, which, indeed, would not commend itself to the sportsman. Now we should much like to make Bracton mean the same thing, but *posueras* has in his text become *tetendi* or *tetendit*, while *cohaeret* has become *cohercerem*, which is corrupted into *cohercionem* or *cohercione*. It is possible that Bracton has misunderstood Azo, and failed to see that there were two persons (you and I) in the case. Thus he would get to the proposition that if I set a snare and a boar is caught, that boar

[Inst. 2. 1. § 18]. idem in ‘insula nata in mari,’ ut in. e. § *item insula* [Inst. 2. 1. § 22]. et ‘idem in similibus’¹ et ‘in rebus habitis pro derelicto,’ ut in. e. § ultimo [Inst. 2. 1. § 48].

‘Iure gentium acquiritur etiam dominium per accessionem discretam vel secretam aut concretam seu continuam. nam quae ex animalibus dominio tuo subiectis nata sunt, tibi adquiruntur. Praeterea quod per alluvionem agro tuo flumen adiecit, iure gentium tibi acquiritur. Est autem alluvio incrementum latens. Per alluvionem autem adici videtur quod ita paulatim adicitur ut intellegere non possis quantum quoquo momento temporis adiciatur. nam et si tota die figas intuitum, imbecillitas visus tam subtilia incrementa perpendere non potest, ut in cucurbita et similibus ostendi potest. Si autem non sit latens incrementum, immo apparens, contrarium est. ut ecce vis² fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulit: certum³ est eam tuam permanere. plane si longiori tempore fundo vicini haeserit, arbores quoque quas secum traxerit in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse,’ ut in. e. § *praeterea* [Inst. 2. 1. § 20]. utilis ‘tamen vindicatio datur priori domino secundum’ Mar[tinum], ut ff. *de rei vin. l. si frumentum* § *de arbore*.

[D. 6. 1. 5. § 3. De arbore quae in alienum agrum translata coaluit et radices immisit, Varus et Nerva utilem in rem actionem dabant. nam si nondum coaluit, mea esse non desinit.]

¹ *missilibus* Cai.

² *ius* Sp. Pap.; *vis* Ven. Cai.

³ *palam* Inst.

becomes mine when I have taken it out and it is in my power. If Bracton did not make this mistake himself, his copyists soon began to make it for him. Not impossibly, as will be seen from the variant *posueram* for *posueras*, the copy of Azo that he had was guilty of the blunder. It is a not very unnatural one; it substitutes a simple for a complex case.

In the last words of this section (p. 101) Bracton swerves from Azo in order that he may hint once more that in England what belongs to nobody else belongs to the king 'propter fisci privilegium.'

[II. 2. § 1.] 'Adquiruntur etiam iure gentium rerum [L. 9]
 'dominia per accessionem discretam vel secretam, con-
 'cretam seu continuam. et quæ ex animalibus dominio tuo
 'subiectis nata sunt, tibi adquiruntur. item quod per
 'alluvionem agro tuo flumen adiecit, iure gentium tibi
 'adquiritur. Est autem alluvio latens incrementum, et per
 'alluvionem adici dicitur quod ita paulatim adiecitur,
 'quod intellegere non possis quoquo¹ momento temporis
 'adiciatur. nam et si tota die figas² intuitum,³ imbecil-
 'litas visus tam subtilia incrementa perpendere non potest,
 'ut videri poterit in cucurbita et similibus. Si autem non
 'sit latens incrementum, immo apparens, contrarium erit.
 'ut ecce vis fluminis partem aliquam ex tuo prædio
 'detraxit et vicini prædio appulit: certum est eam tuam
 'permanere. et si longiori tempore fundo vicini adhaeserit
 'et arbores, quas secum traxerit, in eum fundum radices
 'egerint, ex eo tempore videntur fundo vicini adquisitæ.
 'dabitur tamen priori domino utilis vindicatio secundum
 'quosdam, sed cessat rei vindicatio, quia alterius facta est
 'crusta, et alia dicenda est arbor, alio⁴ terræ alimento.'
 [§ 2.] 'Habet etiam locum eadem species accessionis in
 'insula nata in flumine, quæ si quidem mediam partem
 'fluminis teneat, communis est eorum pro diviso qui⁵ ab
 'utraque parte fluminis prope ripam prædia possident pro

¹ quoquo Dig. Corb. Cr.; quo Ed.

² infigas. Vulg.

³ Insert tuum Vulg.

⁴ alio Dig. Corb. Ed. Cr. Azo, Digest; aliae Vulg.

⁵ pro diviso Dig. Corb. Cr.; diviso changed to indiviso Ed.; qui pro indiviso Vulg.

Sed dicimus nos dari actionem in factum, ut in specificatis dicitur, ut ff. *de rei ven.* l. *in rem* § *item quaecumque*.

[D. 6. 1. 23. § 5. Item quaecumque aliis iuncta sive adiecta accessionis loco cedunt, ea quamdiu cohaerent dominus vindicare non potest, sed ad exhibendum agere potest ut separentur, et tunc vindicentur. . . . Non idem in eo quod applumbatum sit, quia ferruminatio per eandem materiam facit confusionem, plumbatura non idem efficit. Ideoque in omnibus his casibus, in quibus neque ad exhibendum neque in rem locum habet, in factum actio necessaria est . . .]

‘cessat autem rei vindicatio, quia alterius est facta crusta, et alia dicenda est arbor, alio terrae alimento’ ut ff. *de damno infe.* l. *hoc amplius* § *Alphenus*, et *de adq. re. do.* l. *sed in eis* § *arbor* [D. 39. 2. 9. § 2; D. 41. 1. 26 (*sed si meis*). § 1]. ‘Habet etiam locum eadem species accessio-
nis in insula nata in flumine, nam si quidem mediam
partem fluminis teneat, communis est eorum pro diviso qui
ab utraque parte fluminis prope ripam praedia possident
pro modo latitudinis cuiuscumque fundi, quae latitudo
prope ripam est. quod si alteri parti proximior sit,
eorum est tantum qui ab ea parte prope ripam possident
praedia. Si autem insula nata esset in mare, quod raro
accidit, occupantis fit.’ nullius enim esse creditur, ut in.
e. § *insulam* [Inst. 2. 1. § 22]. ‘Non tamen credas pro-
prium alicuius agrum in formam insulae redactum insulam
esse: ut ecce flumen dividitur in superiori parte et
circuit agrum alicuius, de infra¹ unitur: nam eiusdem
permanet ager cuius et fuerat,’ ut in. e. § *insula*, et ff. *de
adq. re. do.* l. *ergo* § *tribus* [Inst. 2. 1. § 22; D. 41. 1. 30.
§ 2]. ‘Cave tamen tibi in metienda vicinitate praedictae
insulae, quia facile potest aliquis decipi in ea.² Est
enim punctum quoddam ponendum in medio³ inter
utrumque agrum, et secundum hoc si insula vel citra
punctum vel ultra punctum sit, vel huius tantum vel

¹ *deinde infra* Cai.

² *eo* Cai.

³ Insert *insulae* Sp. Bas.; omit Cai. Y. Z.

‘ modo latitudinis cuiuscumque fundi, quae latitudo prope
 ‘ ripam sit. quod si alteri parti proximior sit, eorum est
 ‘ tantum qui ab ea parte prope ripam praedia possident. [t. 9 b]
 ‘ Si autem insula in mari nata sit, quod¹ raro accidit,
 ‘ occupantis fit.’ ‘ Non tamen credas proprium alicuius
 ‘ agrum in formam insulae redactum insulam esse : ut ecce
 ‘ flumen dividitur in superiori parte² et circuit agrum
 ‘ alicuius, et deinde³ infra unitur : quo casu eiusdem⁴ erit
 ‘ ager cuius prius fuerat. Cavendum quoque erit in
 ‘ metienda vicinitate insularum, quia potest quis in hoc de
 ‘ facili decipi. Ponatur igitur punctus quidam in medio
 ‘ inter utrumque agrum,⁵ et secundum hoc si insula citra
 ‘ punctum sit,’ ‘ vel huius tantum vel illius tantum erit. si
 ‘ autem sit et citra punctum et in ipso puncto et ultra,
 ‘ tunc pro diviso⁶ communis erit, ut tantum mihi⁷ de ipsa
 ‘ insula cedat quantum continetur a medietate puncti usque
 ‘ ad agrum meum, et sic fiat in persona vicini quoad
 ‘ divisionem. et videtur quod vicinitas et remotio insulae
 ‘ considerari debet secundum principium nativitatis suae.
 ‘ et inde erit, quod si inter insulam quae mihi proximior
 ‘ est et contrariam ripam vicini, quae est ultra flumen,
 ‘ alia sit nata insula, mensura fiet a mea insula et non ab
 ‘ agro meo. Et haec omnia tenenda sunt in insula quae
 ‘ alvei solo adhaeret, et non quae virgultis sustentatur. Si
 ‘ autem insula rotunda inveniatur, difficile erit eam metiri.
 ‘ hoc tamen observetur, ut⁸ omne quod propinquius est
 ‘ mihi cedat, et ita illi⁹ cedat quod¹⁰ vicinius erit. et hoc
 ‘ nunquam fallit. Habent quidem¹¹ locum haec in agris
 ‘ non limitatis, nam¹² in limitatis non habet locum ius allu-
 ‘ vionis. sunt autem limitati,’ ‘ qui assignantur aliquibus
 ‘ certis locis et certis terminis, ut sciatur¹³ quid cui datum
 ‘ sit et quid retentum et relictum.’ ‘ Praeterea agris limi-

¹ quae Vulg.² Omit parte Dig. Ed. Cr.; insert Vulg.³ deinde Dig. Corb. Ed.; demum Vulg.⁴ eiusdem Dig. Corb. Ed. Cr.; eius Vulg. ⁵ in medium agrum Ed. Cr.⁶ diviso Dig. Corb. Cr.; changed to indiviso Ed.; indiviso Vulg.⁷ Sic Ed. Vulg.; tantum inde Dig. Corb. Cr. ⁸ quod Vulg.⁹ ille Dig.; illud Ed.; illi Azo; vicino Vulg. ¹⁰ Insert ei Vulg.¹¹ Habet etiam Vulg. ¹² nam Ed. Vulg.; non Dig.¹³ ut sciatur Cr. Ed. Azo; ubi scitur Dig. Vulg.

‘ illius tantum erit.¹ si autem sit et citra punctum et in ipso puncto et ultra, tunc pro diviso communis erit, ut tamen mihi tantum de insula cedat quantum continetur a medietate puncti usque ad agrum meum: sic et in persona tua.’ et potest hoc colligi in ff. *de adq. re. do.* l. *Marcus*² [D. 41. 1. 38]. ‘ et videtur quod vicinitas vel remotio insulae consideretur secundum principium nati- tatis insulae,’ ut ff. *de adq. re. do.* l. *insula* [D. 41. 1. 56]. ‘ inde est quod si inter³ insulam quae mihi proximior est et contrariam ripam⁴ vicini, quae⁵ est ultra flumen, alia sit nata insula, mensura fiet a mea insula et non ab agro meo. Item haec omnia in insula quae alvei⁶ solo adhaeret, non quae virgultis sustentatur’ ab aqua, ut ff. *de adq. re. do.* l. penul. et antepenul. [D. 41. 1. 65. §§ 2. 3]. ‘ Sed ubi insula rotunda invenitur, difficile est eam metiri. sed hanc regulam⁷ serva ut omne quod mihi propinquius est, mihi cedat, et ita illi cedat quod ei vicinior est. nec unquam fallit. Praeterea haec locum habent in agris non limitatis, nam in limitatis non habet locum ius alluvionis. sunt autem limitati,’ qui auferuntur hostibus et militibus assignantur, ‘ ut sciatur quid cuique datum sit,’ quid venisset, ‘ quid in publico relic- tum esset,’ ut ff. *de adq. re. do.* l. *in agris*.

[D. 41. 1. 16. In agris limitatis ius alluvionis locum non habere constat: idque et divus Pius constituit et Trebatius ait agrum qui hostibus devictis ea condicione concessus sit ut in civitatem veniret, habere alluvionem neque esse limitatum: agrum autem manu captum limitatum fuisse, ut sciretur quid cuique datum esset, quid venisset, quid in publico relictum esset.]

¹ Pap. and Ven. omit a great part of this sentence and make nonsense of it. *Est enim punctum sit vel huius vel alterius tantum erit.* Pap. *Si enim punctum sit vel huius tantum vel illius tantum erit.* Ven.

² There is no section beginning with this word; but l. 8 comes from Marcianus, and l. 38 begins with *Attius*.

³ Not *inter* but *etiam* in compendio Sp.; *inter* Ven. This sentence and the next are omitted in Cai.

⁴ *ripi* Sp.

⁵ *qui* Sp.

⁶ *alvei* Ven. Bas.; *alieni* Sp. Pap.

⁷ Cai.; *hanc illam* Sp.

‘tatis non cedit insula ratione vicinitatis’ in flumine publico, ‘immo conceditur occupanti,’ et per consequens regi propter suum privilegium. ‘Habet etiam locum eadem species accessionis in alveo fluminis a flumine derelicto. ‘cedit enim eis qui prope ripam fluminis praedia possident, ‘pro modo scilicet latitudinis cuiuscumque agri, quae ‘latitudo prope ripam sit. novus autem alveus eius¹ ‘iuris incipit esse cuius et ipsum flumen, id est publicum. ‘Flumen enim alveum sibi constituendo² agrum privati³ ‘facit publicum, et publicum privatum. et ideo dicuntur ‘flumina vice censitorum,⁴ id est iudicium vel principum, ‘fungi. iudex enim vel imperator saepe quod unius est ‘alteri adiudicat, iuste vel iniuste, bona fide vel mala. sed ‘ubi flumen mihi abstulit meum praedium per alvei constitutionem, deinde redit ad antiquum alveum, de iure ‘stricto in praedio⁵ quondam⁶ meo nihil possum vindicare. ‘cedit enim his qui prope ripam praedia habent. de ‘aequitate tamen vix optinet hoc, id est, nullo modo optinet. ‘Ubi autem flumen alveum sibi non constituit in agrum ‘meum, sed illum inundaverit, non immutatur species eius ‘quantum ad proprietatem.’

NOTES.

The whole of this section is Azonian, and the opinions of the Bolognese doctor are pretty accurately reproduced. But as regards the case (p. 105) in which a torrent detaches from my land soil in which trees are growing and carries it to your land [§ 1], we see Bracton straying. Azo tells us that the glossator Martinus would in this case give me a *utilis vindicatio* for the trees; but Azo himself holds that my only action against you is an *actio in factum*. Bracton attempts to abbreviate the discussion, and says nothing of the *actio in factum*.

As regards the island which arises in mid-stream (p. 107), we have a good instance of the sadly corrupt state of Bracton's text. He has

¹ *eius* Dig. Ed. Cr. Azo; *eiusdem* Vulg.

² *constituendo* Cr. Vulg.; *consuetudo* Dig.

³ *privati* Dig. Corb. Cr. Azo; *privatum* Vulg.

⁴ *sensitorum* Cr.

⁵ *stricto et praedio* Dig. Corb. Cr.; *in praedio* Ed. Vulg.

⁶ *Sic* Dig. Corb. Ed. Cr. Azo; *quodam* Vulg.

‘Praeterea agris limitatis non cedit insula ratione vicinitatis, immo conceditur occupanti,’ ut ff. *de flu. ne quid in flu. pu.* l. i. § *si insula*.

[D. 43. 12. 1. § 6. Si insula in publico flumine fuerit nata, inque ea aliquid fiat, non videtur in publico fieri. illa enim insula aut occupantis est, si limitati agri fuerunt, aut eius cuius ripam contingit, aut, si in medio alveo nata est, eorum est qui prope utrasque ripas praedia possident.]

‘Habet etiam locum eadem species accessionis in alveo fluminis a flumine derelicto. cedit enim eis qui prope ripam fluminis praedia possident, pro modo scilicet latitudinis cuiuscumque agri, quae latitudo prope ripam sit. novus autem alveus eius iuris incipit esse cuius et ipsum flumen, id est publicum. Flumen enim¹ alveum sibi constituendo agrum privati facit publicum, et publicum facit privatum, ut dictum est. et ideo dicuntur flumina vice censitorum, id est, iudicum vel principum,’ uti vel ‘fungi. iudex enim vel imperator saepe quod unius est alteri adiudicat,² vel iuste vel iniuste, vel bona vel mala fide,’ ut ff. *e. l. ergo* § *alluvio* [D. 41. 1. 30. § 3 . . . flumina enim censitorum vice funguntur . . .]. ‘sed ubi flumen mihi abstulit meum praedium per alvei constitutionem, deinde redit ad antiquum alveum, de iure stricto in praedio quondam meo nihil possum vindicare. cedit enim his qui prope ripam habent praedia. de aequitate tamen vix hoc optinet, id est, nullo modo optinet,’ ut ff. *de adq. re. do.* l. *adeo* § *insula* [D. 41. 1. 7. § 5, sed vix est ut id optineat]. ‘Ubi autem flumen alveum sibi non constituit in agrum meum, sed inundat³ agrum meum, non immutatur species eius quantum ad proprietatem,’ ut in. e. § *alia sane* [Inst. 2. 1. § 24]. possessio tamen agri amittitur, ut ff. *de adq. pos.* l. *possideri* § *Labeo*, et § *Pomp. i. Ro.*⁴ [D. 41. 2. 3. § 17; D. 41. 2. 13 pr.]. ‘Haec de accessione quae fit divina natura operante.’

¹ Sp. Pap. have the compendium of *est* rather than that of *enim*.

² *adiudicat* Cai.

³ *inundat* Sp. Pap.; *inundat* Ven. Cai.

⁴ Apparently the second citation should be *et l. Pomponius in pr.*

been made to say that this island 'communis est eorum qui pro 'indiviso ab utraque parte fluminis prope ripam praedia possident.' What he said was: 'communis est eorum pro diviso qui ab utraque 'parte prope ripam praedia possident.' The MSS. suggest that his copyists did not know the difference between *pro diviso* and *pro indiviso*.

A little further on Bracton (p. 107) comes to the *agri limitati*. Even if Azo knew much about the meaning of this highly technical term, we may doubt whether Bracton understood it. The *agri limitati* were, we are told, lands laid out by the *agrimensores* when captured territory was assigned or a new colony was founded. Their boundaries were fixed by rigid lines, and were not to be altered by alluvion. An island which arises in a river that divides such *agri* does not accede to the banks but, says Azo, *conceditur occupanti*. Bracton modifies this by once more asserting that what belongs to no one else belongs to the king. It is improbable, however, that he could have found in England any foundation of fact for the distinction between *agri limitati* and other lands.

‘Superest ut videamus et de accessione quae fit humana
 ‘natura tantum operante. haec autem fit per adiunctionem,
 ‘quae adiunctio fit per applumbaturam aut per ferrumina-
 ‘tionem.’¹ Fit autem adiunctio per applumbaturam cum
 aliquo mediante diversa corpora eiusdem vel non eiusdem
 speciei iunguntur, sive iungantur plumbo vel aliquo simili.
 sed de plumbo dicitur quia eo plerumque fiunt huiusmodi
 iuncturae: ut ecce si cum plumbo quis argentum argento
 vel argentum ferro vel similia adiunxerit. Per ferrumina-
 tionem autem fit iunctura cum argentum argento vel ferrum
 ferro vel corpora diversarum specierum iunguntur per con-
 fusionem ipsarum, ut ff. *de rei vin.* l. *in rem* § *item quaecumque*
 [D. 6. 1. 23. § 5]. Si igitur materiae tuae infectae aliam
 materiam factam vel infectam adiunxeris² quocumque modo,
 quaecumque ratione, quae aliena fuerat prioris domini³ manet,
 nec fit hic communio.⁴ si vero tuae factae speciei alienae
 speciei membrum adieceris per applumbaturam vel ferru-
 minationem, totum corpus tuum erit, id est, hoc totale
 corpus alii rei non accedens: non dico totum, id est, quae-
 libet pars eius. distinguitur enim utrum per applumba-
 turam adieceris an per ferruminationem. si per applumba-
 turam et feceris bona fide, prior⁵ dominus non⁶ desinit
 esse dominus, et ad exhibendum agitur ut separet, et
 separatam vindicabit dominus.⁷ si autem mala fide adie-
 ceris, teneris utili rei vindicatione etiam cum adiunctum
 est, ut ff. *de adq. re. do.* l. *quicquid*, et *de rei vin.* l. *in rem*
actio § *item quaecumque*. [D. 41. 1. 27; D. 6. 1. 23. § 5.]
 si autem adieceris per ferruminationem et bona fide, teneris
 actione in factum domino ad pretium materiae suae, non
 rei vindicatione neque ad exhibendum, quia in perpetuum

¹ Add *tantum* Cai. ² *adieceris* Cai. ³ *dominii* Sp.

⁴ The ordinary compendium for *communio* Cai. Sp. Pap. Ven.; but it may be expanded into *confusio*.

⁵ Cai.; insert *tamen* Sp.

⁶ Cai. Y. Z. Bas.; omit *non* Sp.

⁷ The *non* in this sentence seems to be required by the sense. In the case here put, *A*, the owner of *x*, solders to it *y*, which belongs to *B*. Here *A* becomes owner of the *totale corpus* which now exists; but *B* still has ownership, though dormant ownership, of *y*. See Windscheid, *Pandekten*, § 189.

[II. 2. § 3.] ‘Haec de accessione quae fit tantum divina [f. 9 b]
 ‘natura operante. Est et alia, quae fit tantum humana
 ‘natura operante, quae fit per adiunctionem’ unius speciei
 ad aliam,¹ eiusdem generis vel diversi, per applumbaturam
 vel ferruminationem,² secundum quod in Institutis³
 legitur, et ibi⁴ quae pars alteri debet accrescere. ‘Si
 ‘autem per applumbaturam, minor cedit maiori vel pre-
 ‘tiosiori, sed si neutra pretiosior, quilibet suum vindi-
 ‘cabit.’ [§ 4.] ‘Vindicat etiam sibi locum ius accessionis
 ‘in aedificiis per humanae naturae laborem, ut si quis in
 ‘solo suo alienam materiam aedificavit, ipse dominus
 ‘intellegitur aedificii, quia omne quod inaedificatur, solo
 ‘cedit. nec tamen is qui materiae dominus fuerat, domi-
 ‘nus esse desinit, nec suum eximere potest, sed pro eo
 ‘duplum consequetur: et si dirutum sit aedificium, quod
 ‘suum fuerit vindicare poterit, nisi fuerit duplum conse-
 ‘cutus. E contrario autem si quis de suo in alieno solo [f. 10]
 ‘aedificaverit mala fide, materiam praesumitur donasse,
 ‘si autem bona fide, solvat dominus⁵ soli pretium materiae
 ‘et mercedem fabrorum.⁶ Hoc autem quod praedictum
 ‘est locum habet si aedificium sit immobile, si autem
 ‘mobile, aliud erit. ut ecce horreum frumentarium novum
 ‘ex tabulis ligneis factum in praedio Sempronii positum,
 ‘non erit Sempronii. [§ 5.] Haec eadem species accessionis
 ‘per humanae naturae sollicitudinem potest assignari in lit-
 ‘teris. litterae enim, licet sint aureae, perinde membranis
 ‘cartisve⁷ cedunt, sicut⁸ ea solo cedere solent quae aedi-
 ‘ficantur vel inseruntur.’ ‘Sed in picturis erit contrarium.
 ‘ridiculum⁹ enim esset pretiosam picturam accessione¹⁰
 ‘cedere vilissimae tabulae. et ideo tabula cedit picturae,
 ut in Institutis plenius inveniri poterit, et in Summa

¹ alteram Vulg.² ferrilimitationem Vulg.³ infra Vulg.; in Institutis Dig. Corb. Ed. Cr.⁴ Insert dicitur Vulg.⁵ dominus Corb. Vulg.; dominio Dig.; domino Ed.; dominis Cr.⁶ fabricatorum Vulg.⁷ cartis ne Dig.⁸ Omit sicut Dig.; interl. Cr.⁹ Ridiculosum Vulg.¹⁰ per accessionem, Vulg.

recessit ab eo dominium,¹ ut in praedicta l. *de rei vin.* si autem mala fide adieceris, ut puto, dominus manet ille qui dominus fuit, licet totum, id est, totale corpus, dicatur tuum. haec omnia ita intelligo, si quod adiunctum est pars rei efficiatur cui adiungitur, ut si brachium statuae vel ansam cippo adiunxeris: tunc enim prioris domini non manet si bona fide ferruminaveris. Si autem tuam infectam alienae factae mala fide adiunxeris ita ut pars eius fieret, tunc praesumo te donasse, ut in. e. § *si quis in aliena* [Inst. 2. 1. § 34.]. si autem bona fide adieceris, ages ut dictum est in applumbatis et ferruminatis. Si autem tuae factae materiae vel speciei speciem alienam factam, non dico membrum eius ut supra, adiunxeris, ‘si quidem per ‘applumbaturam,’ ut puto, ‘minor cedit maiori, vel’ si nulla sit maior, cedat altera alteri ‘pretiosiori, vel si neutra ‘sit pretiosior,’ neutra cedat alteri, et hic ‘quilibet suum ‘vindicanbit.’² circa fidei distinctionem³ et in duobus praedictis casibus rei vindicatione vel ad exhibendum agitur vel donatum praesumitur, ut supra distinctum est. Idem est omnino si⁴ ferruminaveris, ut ff. *de adqui. rc. do.* l. *quicquid* § ul. [D. 41. 1. 27. § 2.], nisi quod cum altera cedit alteri agitur in factum actione ad pretium, nisi ferruminaveris mala fide, tunc enim teneris rei vindicatione ut supra dictum est.

‘Vindicat etiam sibi locum ius accessionis in aedificiis ‘per humanae naturae laborem. ecce enim cum in suo ‘solo quis alienam materiam aedificaverit, ipse dominus ‘intellegitur aedificii, quia omne quod inaedificatur, solo ‘cedit. nec tamen is qui materiae dominus fuerat desinit ‘dominus esse,’ sed tantisper neque vindicare potest eam neque de ea re agere ad exhibendum per. l. xii. tabularum, qua cavetur ne quis tignum alienum aedibus suis iniunctum eximere⁵ cogatur, ‘sed duplum praestet pro eo ‘per actionem’ quae dicitur de tigno iniuncto. Tigni autem appellatione significatur omnis materia ex qua

¹ *dominium* Ven.; *dominio* Sp. Cai.; *dominis* Pap.

² Punctuation dubious.

³ Omit to *distinctum est* Cai.

⁴ Insert *sic* Sp.

⁵ *exigere* Sp.; *eximere* Inst. Pap. Ven. Cai.

Asonis,¹ quod in casu deterior est condicio possidentis. Item in eodem, quod melior² propter duplex beneficium possidendi. Item in eodem, quod ubi obscura sunt utriusque iura, pro possessore iudicabitur. 'Potest etiam eadem species assignari in textis.³ nam si alienam purpuram quis intexuit⁴ vestimento suo, licet pretiosior sit purpura, tamen cedit vestimento vice⁵ accessionis.' 'Item eadem species accessionis potest assignari in fructuariis et usuariis⁶ circa fructuum obventionem.' [§ 6.] 'Similis⁷ autem accessio erit divina natura et humana cooperante, et quaeritur ex ea dominium. ut ecce Titius alienam plantam in solo suo posuit, ipsius erit planta. et ex diverso si Titius suam plantam in Maevii solo posuerit, Maevii erit planta, si modo utroque casu radices egerit. sed antequam radices egerit,⁸ permanet eius, cuius prius fuerat. et hoc est adeo verum ut si vicini arbor ita terram Titii presserit,⁹ ut in eius fundo radices egerit, Titii erit arbor. ratio enim non permittit ut alterius sit quam eius in cuius fundo radices egerit. item si in confinio arbor posita sit et in vicini fundo radices egerit, communis erit, nec licebit vicino radices excidere. Et hoc verum est si arbor mea in vicini¹⁰ fundo radices egerit sine quibus vivere non possit, quod communis esse debeat, si autem satis vivere possit sine radicibus illis, non erit communis. Qua autem ratione plantae solo cedunt cum radices egerint, et aedificia immobilia, eadem ratione cedunt frumenta, cum sata fuerint et solo coaluerint, sive fortuito casu ceciderint in terram, sive non.'

[II. 3. § 1.] 'Adquiratur etiam nobis¹¹ per specificationem, ut si quis de aliena materia speciem fecerit aliquam, dominus erit speciei qui fecit.'

¹ Sic Vulg.; but no *Asonis* in Dig. Corb. Ed. Cr. Reg. Gl. Shep. Chert.

² Insert *est conditio possidentis* Vulg. ³ *texturis* Vulg.

⁴ *intexuerit* in Vulg. ⁵ *iure* Vulg.; *vice* Dig. Ed. Cr.

⁶ *usuariis* Ed. Cr. Vulg.; *usurariis* Dig.

⁷ *Illis*, not *Similis*, Dig. Corb. Ed. Cr.; *Alia* Vulg.

⁸ Omit last four words Dig. Cr.; Vulgate inserts two hexameters, for which see Notes. ⁹ *oppresserit* Vulg. ¹⁰ *vicinio* Dig.

¹¹ Insert *res* Vulg.

fiunt aedificia. 'Si tamen aliqua causa dirutum¹ sit aedificium, poterit materiae dominus eam vindicare si non fuerit duplum consecutus. Et e contrario qui aedificat in alieno solo de sua materia, si quidem mala fide, praesumitur donasse, licet M[artinus] distinxerit habuit animum donandi an non. 'si vero bona,' habet doli exceptionem, ne aliter teneatur restituere nisi 'dominus soli pretium solvat et mercedes fabrorum,' ut in. e. § *cum in suo*, et § *ex diverso* [Inst. 2. 1. §§ 29-30]. et hunc articulum plenius explicui in summa C. *de rei vin.* § *quid ergo*, et § *quid impensarum* [Summa Azonis, C. 3. 32]. 'Ubi autem quod aedificatur mobile est,² ut ecce horreum frumentarium novum ex tabulis ligneis factum in praedio Seii seu³ positum, non erit Seii,' ut ff. *de adq. re. do.* l. *Titius* [D. 41. 1. 60]. 'Haec eadem species accessionis per humanae naturae sollicitudinem potest assignari in litteris. litterae enim, licet sint aureae, perinde cartis membranisque cedunt ac⁴ si solo cedere solent ea quae inaedificantur aut inseruntur.' ideoque si in cartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, huius corporis non Titius sed tu dominus esse videris. sed si a Titio petas libros tuos tuasve membranas esse,⁵ nec impensam scripturae solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si bona fide harum cartarum possessionem est nactus, ut in. e. § *litterae* [Inst. 2. 1. § 33]. 'Quod autem dictum est in litteris non habet locum in picturis. ridiculum enim esset pretiosam picturam accessione vilissimae tabulae cedere. immo tabula cedit picturae.' non omnino tamen, quia dominus tabulae habet rei vindicationem utilem, pictor autem directam. Quid ergo si unus eorum ab altero petat? Et certe si pictor petat a⁶ domino tabulae imaginem possidente, poterit per exceptionem doli mali submoveri, nisi solvatur⁷ pretium tabulae. si vero pictor possideat, domino tabulae datur utilis in rem actio, sed submovetur doli exceptione, nisi solvat pretium picturae, utique si bona fide possessor fuit

¹ *dirutum* Inst. Cai; *disruptum* Sp. ² Insert *non cedit solo* Bas.

³ Omit *seu* Bas. ⁴ *at* Sp. ⁵ Omit *esse* Bas. ⁶ *a* repeated Sp. ⁷ *solvat* Bas.

[II. 3. § 2.] ‘Est etiam alius modus acquirendi per confu-
 sionem. Confunduntur itaque liquida ut mel et vinum.
 ‘confunduntur etiam solida, licet cum difficultate magna,
 ‘videlicet species, sicut aurum et argentum, plumbum et fer-
 ‘rum: et quod ex his redigitur erit commune, sive separari pos-
 ‘sit sive non, inter eos de quorum voluntatibus corpora sive
 ‘species confunduntur. si autem casu fortuito fiat confusio
 ‘et separari non possunt, idem erit.’ ‘si autem separari
 ‘possunt materiae,’ ‘unusquisque partem ponderis et men-
 ‘surae habebit, quam habuit in rudi materia.’ ‘Si autem
 ‘frumentum alicuius mixtum fuerit cum frumento alterius,
 ‘non erit frumentum inter eos commune, sed quisque ¹ de [cf. 10 b]
 ‘acervo ² vindicabit partem pro modo sui frumenti. nec
 ‘fieri poterit communicatio frumenti, quia singula corpora
 ‘manent in sua substantia: ac si pecora Titii tuis pecoribus
 ‘essent mixta, et ubi non intellegitur quod grex sit com-
 ‘munis. et quamvis valde difficile sit et quasi impossibile
 ‘separare frumentum meum a frumento tuo, satis tamen
 ‘dici poterit pro parte indivisa dari vindicationem, quasi
 ‘acervus frumenti sit communis, ut vindicet tantum de
 ‘acervo quantum fuerat suum.’ ‘Et differt confusio a
 ‘mixtione in tribus. species enim dicuntur misceri, et
 ‘materiae confundi. item species mixtae remanent in
 ‘eadem substantia et specie, confusae autem transferuntur
 ‘in aliam materiam.’

[II. 3. § 4.] ‘Acquiritur et dominium per inventionem,
 ‘ut si thesaurus inveniatur, secundum quod inferius dicitur
 ‘inter placita coronae.

NOTES.

We are turning from cases of ‘accession’ produced by the operation of natural forces to those in which the act of man has intervened. Bracton (p. 113) in a few lines and with an express voucher of the Institutes (which voucher has disappeared from the Vulgate text) here disposes of a subject which Azo has elaborately discussed. The

¹ *quisque* Dig. Corb. Ed. Cr.; *quilibet* Vulg.

² *Insert suo* Vulg.

ille qui picturam imposuit. Illud certum est quod sive pictor subripiat domino tabulae possidenti tabulas sive alius, competit domino tabularum furti actio, ut in. e. § *si quis in aliena* [Inst. 2. 1. § 34]. sed et pictori contra furem extraneum daretur actio furti. sed et contra dominum tabulae sibi ¹ surripientem similiter possit dari. sed ubi pictor non surripuit domino tabulae vel e converso, quilibet eorum, ut dictum est, agit contra alium possidentem et avocatur ² res possessori. et mirabile videtur contingere quod deterior sit condicio ³ possessoris. quod quidam admiserunt: sicut et ubi servus ex pluribus noxiis diversis personis dominum obligat, et dominus uni eorum dedit, poterit enim ille conveniri ab aliis noxali,⁴ ut ff. *si ex nox. causa agatur* l. i et l. ii. et *de her. pet.* l. *cum idem* [D. 2. 9. 1–2; D. 5. 3. 57]. sed certe in noxali actione, licet ille cui deditus est teneatur aliis, melior est tamen condicio eius, ut ff. *de nox.* l. *si quis a multis* [D. 9. 4. 14], quia forte posterior non poterit probare intentionem suam, vel si probaverit ipse et probaverit reus contrarium et obscura essent utriusque iura, pro possessore pronuntiaretur. praeterea in ⁵ ista tabula picta potest dici melior condicio possidentis propter duplex beneficium. habet enim doli exceptionem pictor nisi solvatur ei pretium picturae, vel, si malit, offerat domino tabulae pretium tabulae, et si nolit accipere, retinebit tabulam. Quid si tabula fuerit abrasa? Dico idem quod in ferruminatis. Quid si ambo agant contra extraneum? Forte praeferetur pictor quia habet directam. Quid si pinxerit mala fide? Etiam ibi dixit P[laacentinus] tabulam picturae cedere. sed non puto verum, quia cum ei denegatur exceptio, ut supra dictum est, ergo multo magis dicitur denegari ⁶ actio. Quaeritur cur aliud sit in scriptis quam in pictis. Respondeo, quia olim fere semper erat pretiosior carta quam scriptura et e converso pictura erat pretiosior tabula, unde tabula cedebat picturae. Nec obstat quod legitur ff. *de rei vin.* l. *in rem* § *sed et id quod carta* [D. 6. 1. 23. § 3], corrigitur enim per legem Institutionum

¹ Omit *sibi* Cai.² *advocatur* Sp.³ *condictio* Sp.⁴ Add *actione* Bas.⁵ Omit *in* Sp. Pap.⁶ *magis denegatur* Cai.

general problem is to determine how ownership stands when in some permanent fashion a thing that belongs to me has been joined to a thing that belongs to another. Many distinctions must be drawn. (1) What is thus added may be in itself a manufactured article or mere raw material. (2) The juncture may be effected by *applumbatura* or by *ferruminatio*. The former of these words has been taken to describe a process whereby two things are joined by means of a third: in particular, a case in which two things, perhaps two silver things, are soldered together by lead. On the other hand there is *ferruminatio*, where no third thing is used as a medium: for example, where two silver things are united by the application of heat. We gather from Windscheid, *Pandekten*, § 189, that there has been controversy among modern civilians as to the exact import of these contrasted terms. (3) The result may be that a 'member' is thus added to an existing thing, as when an arm is added to a statue or a handle to a cup, so that we can here speak of principal (*Hauptsache*) and accessory (*Nebensache*); or, on the other hand, the addition may not be of this kind. (4) Lastly, we have to take account of good and bad faith. In all Azo has many cases to consider.

Bracton quotes as though it were some general rule what with Azo is but the solution of one of the many cases. If in good faith you add to a thing that is yours some *materia facta* that is mine, and in so doing you are not making my thing a member or accessory of yours, and this you do by way of *applumbatura*, then, says Azo, 'ut puto, minor cedit maiori, vel si nulla sit maior, cedit altera alteri pretiosiori, vel si neutra sit pretiosior, neutra cedit alteri, et hic quilibet suum vindicabit.'

There follows the case in which building materials accede to the land. Bracton (p. 113) here follows Azo (p. 114), whose text consists for the more part of a transcript from the Institutes. As to the case in which I *mala fide* build with my materials upon your soil, there had been some difference of opinion among the glossators. Martinus, according to Azo, had held that the materials only become yours if I built the house *animo donandi*. Azo holds that I am always presumed to have given them. Later writers have found some difficulty in reconciling the various texts which touch this question. Bracton says nothing of the controversy.

Bracton's passage (p. 113) about the accession of *litterae* to the *carta* on which they are written is a brief and rude abstract of what Azo has said (p. 116). Bracton holds that the written matter cedes to the parchment, but omits to add that the owner of the parchment cannot recover it from the writer, who has been acting in good faith, unless willing to pay the cost of the writing. As to the case of the picture, Azo raises the question why a distinction should be drawn between painting and writing. He thinks that in old times the *carta* was more valuable than what was written on it. Nowadays it is otherwise, for the writers of our time are painters and the writing is almost

[Inst. 2. 1. § 34]. vel distingue, sit pretiosior pictura quam tabula vel e converso. et ad hoc tendere videtur P[laecentinus], qui ait locum habere quod dicit lex, tabulam picturae cedere, ita demum si pingatur homo, non ursus, et ita si pictura sit de bonis coloribus, non de calce vel encausto¹: et alia multa fabulatus est de pictura. vel quod ibi dicit referendum est ad scripturam et ad cartam. hodie autem scriptores nostri temporis facti sunt pictores, et fere semper invenitur pretiosior scriptura quam carta, unde propter alteratum cursum naturae vel consuetudinis posset hodie contrarium responderi. ‘Potest haec eadem species accessionis² assignari in textis vel insertis vel inclusis. nam ‘si alienam purpuram quis intexuit vestimento suo, licet ‘pretiosior est purpura quam vestis, accessionis vice cedit ‘vestimento suo,’³ et qui dominus fuit purpurae adversus eum qui surripuit habet furti actionem et condictionem, sive ipse est qui vestimentum fecit sive alius. nam extinctae res, licet non possint vindicari, condici tamen a furibus et a quibusdam aliis possessoribus possunt, ut in. e. § *si tamen alienam* [Inst. 2. 1. § 26]. sed potest agi pro eis ad exhibendum, ut notavi in summa C. *de rei vin.* § *sic ergo res* [Summa Azonis, C. 3. 32]. ‘Item eadem species accessionis potest assignari in his’ qui non sunt domini sed quasi domini, ratione tituli vel ratione possessionis bonae fidei vel ratione iuris quod habent in re, ut quia ‘sunt fructuarii vel usuarii, scilicet circa fructuum obventionem vel ‘perceptionem,’ ut in. e. § *si quis a non domino* [Inst. 2. 1. § 35]. fructuum tamen fit varia distinctio ut notavi in summa C. *de rei vin.* § *fructus quoque* [Summa Azonis; C. 3. 32].

‘Fit etiam accessio divina natura et humana cooperante, et quaeritur ex ea dominium: ut ecce Titius alienam ‘plantam in suo solo posuit, ipsius est planta, et ex diverso⁴ ‘si Titius suam plantam in Maevii solo posuerit, Maevii ‘planta erit, si modo utroque casu radices egerit: ante autem ‘quam radices egerit, eius permanet cuius et fuerat. et

¹ enchausta Cai.

² Omit accessionis Cai.

³ Omit suo Cai.

⁴ e contrario Cai.

always more valuable than the material on which it is written : that is to say, the written book will be worth more than twice as much as the bare parchment. So in Azo's opinion the rule for the picture might now be applied to the book. Incidentally Placentinus must be controverted; he has drawn frivolous distinctions between pictures of men and pictures of bears, between pictures in good colours and pictures in chalk or ink.

Bracton's remark (p. 115) 'quod in casu deterior est condicio possidentis' will hardly be understood unless, as he bids us, we refer to the *Summa Azonis*. Azo's opinion (p. 116) about the famous case of the picture is this:—The panel cedes to the picture; but not altogether; for while the painter has *rei vindicatio directa*, the owner of the panel has *rei vindicatio utilis*. Suppose, then, that one sues the other. (1) The owner (or *quondam* owner) of the panel is in possession; the painter sues: the defendant is protected by an *exceptio doli*, unless the painter will tender the price of the panel. (2) The painter is in possession; the owner of the panel sues: the defendant, if a *bona fide* possessor, is protected by an *exceptio doli*, unless the plaintiff will tender the price of the painting. So if the painter abstracts the painted panel from the *quondam* owner of the panel, the latter has an *actio furti*; and conversely if the owner of the panel abstracts it from the painter, the latter has an *actio furti*. But, putting this case of abstraction or surreption out of account, we have an odd state of things: the party who is not in possession can always recover the painted tablet from the party who is in possession. This is a marvelous result—*deterior est condicio possidentis*. After a few words about what some had thought a parallel case, Azo tries to explain that after all *melior est condicio possidentis*. Thus the painter, if in possession, can compel the owner of the panel to do one of two things, either to pay the value of the painting or abandon all claim to the panel. Thus we may say that after all the possessor is better off.

Bracton then (p. 115) follows Azo to the case of the purple that is woven into a garment; but omits to mention the possibility of an *actio furti* or *condictio*. In the last sentence of this paragraph he follows Azo in treating a case of *fructuum perceptio* as a case of *accessio*.

The case of trees and plants (p. 115) seems to have been more intelligible or more interesting to Bracton than the other cases. The Vulgate text here introduces two hexameters which do not come from Azo, and the MSS. leave little doubt that they did not form part of Bracton's original text.

Quicquid plantatur, seritur, vel inaedificatur,
Omne solo cedit, radices si tamen egit.

They occur also in Thomas of Marlborough's *Chronicon Abbatiae de Evesham*, p. 125; but their origin is unknown to us.

'Specification' Bracton dismisses (p. 115) in a single sentence. As usual, he says nothing of good or bad faith. The end of what he

‘est hoc adeo verum ut si vicini arbor ita terram Titii
‘presserit ut in eius fundo radices egerit, Titii effici arborem
‘dicimus, ratione enim non permittente ut alterius arbores
‘esse intellegantur, quam cuius in fundo radices egissent.
‘et ideo prope confinium arbor posita, si etiam in fundo
‘vicini radices egerit, communis fit: non tamen licet eas
‘recidere,’ nisi forte praemissa denuntiatione. agere autem
licebit non esse ei¹ ius sicuti tignum aut protectum immis-
sum habere, ut in. e. § *si Titius*, et ff. *de arbo. ce.* l. i., et
ar. fur. ce. l. *si plures* § i. [Inst. 2. 1. § 31; D. 43. 27. 1;
D. 47. 7. 6. § 2]. Vel distingue an ‘in radicibus sint tales
‘sine quibus non poterat vivere, an poterat, ut in primo casu
‘arbor sit communis, in secundo non,’ sed agi possit ius
non esse ita radices immissas habere. ‘Qua autem ratione
‘plantae’ quae terra coalescunt, ‘solo cedunt, eadem ratione
‘frumenta quoque quae sata sunt solo cedere intelleguntur,’
et sicut is qui in alieno solo aedificavit, si ab eo dominus
petat aedificium, potest per exceptionem doli mali defendi,
secundum ea quae diximus, ita eiusdem exceptionis auxilio
potest esse tutus is qui in alienum fundum sua impensa
bona fide consevit,² ut in. e. § *qua ratione* [Inst. 2. 1. § 32].
Quod autem dixi in satis et plantatis dicerem et si sola
divina natura plantae vel ‘frumenta solo coaluerunt, ut si
‘fortuito casu ceciderint in terram,’ ut in. e. § *praeterea quod*
per alluvionem § *ibi plane si longiore etc.* [Inst. 2. 1. §§ 20, 21].
Illud notandum videtur ex praedictis, quod iure accessionis
quandoque res videtur extinguí, eo quod per se non censetur,
nec in numero ponitur, ut in rota et manica et gemma, et
haec accessio non adimit dominium rei. et idem in tigno
iniuncto et in applumbatis. secus est in ferruminatis et
plantatis et in satis et in confusis et in specificatis: istae
enim accessiones transferunt dominium rei. et idem videtur
in nummis³ mixtis cum alienis.

‘Acquiritur etiam nobis dominium per specificationem.
‘qui enim speciem aliquam de aliena materia facit, dominus
‘est speciei,’ si bona fide id fecit, non⁴ si mala, ut ff. *ad*

¹ *cuius* Cai.

² *consuevit* Sp.; *conseruit* Cai.

³ *mimis* Sp.; *nummis* Cai.

⁴ *ut, not non*, Cai.

writes about 'confusion' (p. 117) is a good instance of his carelessness. He copies Azo's statement that there are three respects in which 'mixture' differs from 'confusion,' but only mentions two out of the three.

Azo proceeds to discourse on *inventio* and *traditio*. Bracton refuses to follow him, and for that reason we do not print what Azo says. Bracton has no interest in *inventio* except in relation to treasure trove, of which, as he tells us, he is going to speak in his treatise on the pleas of the crown (see Bracton, f. 120). As to *traditio*, or livery of seisin, the time to talk of that will have arrived when he takes up the law of *donatio*, that is of feoffment.

Occasion may be taken of this interval to fill what would otherwise be blank pages with a few marginal glosses on Bracton's text taken from the Cambridge MS. Dd. vii. 6. These glosses seem to come from a man who was at work in the last years of Edward I. and the first of Edward II.

1. *Of Natural and Common Law.*

Nota quod inter omnia iura ius naturale communius est quia quod natura dedit, tollere nemo potest. deinde ius gentium quia animalibus exclusis omnes gentes eo utuntur. et tercio ius civile, quia animalia quidem excluduntur et etiam quaedam gentes. unde omnia ista iura communia sunt, quia ius civile commune ad omnes civitates, nisi adiectio fiat certa, ut sic, ius civile talis civitatis. Ius gentium communius est. Ius naturale omnium communissimum est. Et licet ius civile commune sit, tamen cum adiectione specialissimum est.

2. *Of the Origin of Slavery.*

Nota quod origo servitutis est peccatum, quia invidia primo causabat bella: bella captivitates quae servitutes inducebant. unde sicut ecclesia admittit liberos et legitimos ad promotiones spirituales, sic et seculum, id est secularis lex, admittit tales ad successiones temporales.

3. *Of the Detection of Liberty by Manumission.*

Nota quod sicut candela in absconso tegitur, ita quod lumen eius non videtur, sic libertas alicuius in potestate alterius per subiectionem existens tegitur. sed cum fuerit subiectio remissa, detegitur libertas, quae detectio dicitur manumissio. unde datio libertatis improprie dicitur, quia potius concessio, antiqui enim supponebant dationem tam incorporalium quam corporalium.

exhibendum, l. *de eo* § *si quis*, et si fecit nomine suo, ut ff. *de adquiren. re. do.* l. *quicquid* § *ubi* [D. 10. 4. 12. § 3; D. 41. 1. 27. § 1.], et si species non possit reduci ad priorem materiam. ut ecce si quis ex alienis uvis vel olivis aut spicis vinum aut oleum aut frumentum fecerit, vel ex alieno melle et vino mulsum miscuerit, vel ex alienis medicamentis emplastrum vel collyrium composuerit, vel ex aliena lana vestimenta fecerit, vel ex alienis tabulis navem vel armarium¹ vel subsellium fabricaverit. secus autem ubi potest reduci. ut ecce si ex alieno auro vel argento vel aere vas aliquod feceris, vas conflatum potest ad rudem massam auri vel argenti vel aeris reduci, ut in. e. § *cum ex aliena materia* [Inst. 2. 1. § 25]. In frumento etiam facto de spicis quidam dixerunt contrarium ei quod diximus supra, scilicet, ut sit eius cuius et spicae fuerunt. cum enim grana quae spicis continentur perfectam habeant suam speciem, qui excussit spicas non novam speciem facit, sed eam quae est detegit, ut ff. *de adqu. re. do.* l. *adeo* § *cum quis* [D. 41. 1. 7. § 7]. sed forte eorum sententia corrigitur per legem Institutionum quae posterior est. Fecisse aliquem intellego speciem si per se fecit, vel per eum cui mandavit, vel qui ab alio suo nomine factum ratum habuit, ut ff. *de vi et vi ar.* l. *i. fecisse*² [D. 43. 16. 1. § 12]. alias in omni casu dominus materiae dominus est speciei. multo magis ergo si ipse fecit vel alius nomine suo, si ipse mandavit vel ratum habuit. Speciem factam intellego etiam imperfectam ex quo rudis materiae nomen exuerit, ut ff. *de auro et ar. le.* l. *et si non sunt* § *argento* [D. 34. 2. 19. §§ 9, 11 (?)]. Et videtur quod in specificationis modo deficiat regula, meum est quod ex re mea superest cuius vindicandi ius habeo, ut ff. *de rei vin.* l. *solum* § *i.* [D. 6. 1. 49], forte quia videtur res extincta cum novam formam recepit, quia forma rei est esse rei, ut ff. *ad exhibendum*, l. *Iulianus* § *si quis* [D. 10. 4. 9. § 3].

‘Est alius modus acquirendi dominium ut per confusionem. Confunduntur autem liquida ut mel et vinum, item species ut argentum et aurum et plumbum et ferrum, licet fiat cum difficultate magna. Si igitur materiae ali-

¹ *annarium* Sp. Pap.

² Corr. *deiecisse*.

4. *Of the King and his Earls.*

Rex ideo sibi associat comites, barones et milites et alios ministros ut sint particeps honoris et oneris, quia per se non sufficit sibi ipsi ad regendum populum. Rex enim dicitur a regendo. et qui regere debet praecipere oportet et non praecipere, quia aliter sequeretur quod non esset regens et gubernatus [*corr.* gubernans] set potius reetus et gubernatus. quod quidem non est verum, et satis hoc probatur in littera. quia parem non habet nec superiorem. set hoc videtur instantiam recipere, quia comites dicuntur socii regis. et sic arguo: Qui habet socium habet magistrum: rex habet socium, scil. comitem, ergo rex habet magistrum. et ultra: Qui habet magistrum habet superiorem: rex habet magistrum, ergo rex habet superiorem.

5. *Of Natural Law and the Lordship of the Sea.*

Et nota de prima parte quod in Anglia minus usuratur de iure naturali quam in aliqua regione de mundo quia Rex Angliae vocatur dominus marium propter potestatem suam quam habet in aquis.

6. *Of Natural Law and Forestal Rights.*

Nota quod ius naturale locum habet specialiter in quatuor elementis et in his quae elementis proxima sunt, sicut in piscibus, feris bestiis et volueribus. sed quia de iure gentium ista regibus conceduntur et principibus, ideo in locis specialibus praerogativa potestas principis sibi vindicat locum in his. et sic derogatur iure naturali. et sic patet quod in locis defensis et in warennis et in forestis non habet istud genus acquisitionis locum sed in locis deafforestatis.

7. *Of Accession.*

Jay vne piece de metal qe peyse vne liure, vus anez vne antre pece de mesme le metal qe poyse demie liure. vus me bayllez la vostre agarder, ou en antre manere ay cele vostre pece en possession. je les ay ioynt ensemble par soldure. vus me enpledez et en pledant je ne pnyz desafubler, cyns suy atteynt. vus priez exceution et rien ne volez prendre fors qe mesmes eele pece. quid fiet? vus auerez la value de la double qar la meyndre remeyndra ove la greyndre.

Of these glosses that which is here numbered 5 is especially noteworthy as witnessing a very early claim on the part of the King of England to a lordship of the sea. See Mr. Marsden's Introduction to his *Select Pleas in the Court of Admiralty*, p. xxx. The remark

‘quorum his volentibus confundantur, corpus quod ex his redigitur erit commune, possint vel non possint separari. ‘quod si fortuito casu fiat confusio, idem est, si tamen ‘separari non possint,’ ut insti. *de rerum di.* § *si duorum*, et ff. *de rei vin.* l. *qui gregem* § *ul.*, et l. *quo*¹ *quidem* [Inst. 2. 1. § 27; D. 6. 1. 3. § 2; D. 6. 1. 4]. Idem est et si alter confundit cui non conceditur iure specificationis, ut ff. *de rei vin.* l. *si frumentum* § *si ex melle* [D. 6. 1. 5. § 1]. concederetur autem alteri iure specificationis si bona fide fecerit speciem ex materiis duorum et suo nomine, et quod factum est ad priorem materiam non possit reverti, ut supra dictum est. ‘Si vero’ sine voluntate dominorum fiat confusio et ‘separari possunt materiae,’ ut si plumbum cum argento mixtum sit, non fit communicatio: agitur autem in rem actione. sed ubi separatio fieri non potest, ut si aes et aurum mixtum sit, ‘unusquisque partem ponderis sui et ‘mensurae habebit quam habuit in rudi materia,’ et eam partem a quolibet possidente vindicabit, plus tamen feret ille cuius materia pretiosior fuit, ut ff. *de rei vin.* l. *qui gregem* § *ul.* et l. *quo*² *quidem* [D. 6. 1. 3. § 2; D. 6. 1. 4]. Ubi autem voluntate dominorum commixtae sunt species, ut frumentum, fit communicatio: aliter non, ‘sed quisque’³ ‘de acervo pro modo sui frumenti vindicabit partem,’ et arbitrio iudicis continetur ut is existimet quale cuiuscumque fuerit frumentum. ‘non tamen fit communicatio frumenti, ‘quia singula corpora manent in sua substantia. sicut est ‘enim’⁴ si pecora Titii cum pecoribus tuis fuerint mixta, ‘non intellegitur grex esse communis,’ ut in. e. § *quod si frumentum* [Inst. 2. 1. § 28]. ‘Quid autem si valde difficile et ‘quasi impossibile separare frumentum meum a frumento ‘tuo? Satis poterit dici pro parte indivisa dari vindicationem, quasi acervus frumenti sit communis, ut vindicet ‘tantum de acervo quantum fuerat suum,’ ut ff. *de usuf.* l. *usufructuarium* § *si in vivariis*⁵ [D. 7. 1. 62. § 1]. forte et in hoc casu locum habet quod dicitur, ut existimet iudex quale frumentum fuerat cuiuscumque. ‘Ergo differt confusio a

¹ *quod* Sp.⁴ Omit enim Cai.² *quod* Sp.³ *sed si quis* Sp.⁵ *vinariis* Sp. Pap. Ven.

that less attention is paid in England to Natural Law than is paid to it in any other country in the world is delightful. In the gloss numbered 6 the glossator endeavours to reduce within rational bounds the enormous doctrine about the royal right to beasts and birds that we find in Bracton's text (above, p. 103).

‘mixtione in tribus. species enim dicuntur misceri, materiae
 ‘confundi,’ licet Pla[centinus] dixerit contra. item species
 ‘mixtae remanent in eadem substantia et specie : confusae
 ‘autem transferuntur in aliam materiam.’ item confusa
 fiunt communia omnium¹ etiam sine voluntate dominorum
 mixta,² sed mixta demum cum voluntate. Illud notandum
 est quod confundere dicitur quis, licet abusive, qui fru-
 menta miscet, ut ff. *loc. et conduc.* l. *in nave Saufeii* [D. 19.
 2. 31, *In navem Saufeii*]. Speciale praeterea reperitur in
 pecunia, ut, licet quis a debitore alienos nummos recipiat
 et cum suis misceat, suos facit, ut ff. *de solut.* l. *si alieni*
 [D. 46. 3. 78]. idem evenit forte propter praerogativam
 solutionis, vel quia impossibile est dignosci alienos nummos
 a suis. Adquiritur etiam nobis dominium per inventionem.
 nam si thesaurum invenerit quis in loco suo, etiam data
 opera, non tamen arte magica, totus est eius. si autem
 arte magica, totus esset fisci. Quod autem dictum est, si
 inveniatur quis in suo, servatur, et si inveniatur in loco sacro vel
 religioso casu fortuito et non data opera, ut in. e. § *thesauros*
 [Inst. 2. 1. § 39].
 Adquiritur etiam nobis dominium de iure naturali per tra-
 ditionem ex causa donationis aut dotis aut ex qualibet alia
 causa.³

De rebus corporalibus seu incorporalibus [Inst. 2. 2].

Ut plenius rerum doctrina intellegatur, quasi in superiori
 titulo assignavit quasdam divisiones rerum, quibus subiecit
 etiam acquisitiones rerum, quarum species diligenter prose-
 cuti sumus, adhuc in praesenti titulo ‘aliam’ subiecit
 ‘divisionem talem, quod rerum aliae sunt corporales,
 ‘aliae incorporales. Corporales sunt hae quae sui natura
 ‘possunt tangi, veluti fundus, homo, vestis, aurum, ar-
 ‘gentum et aliae res innumerabiles, id est, quae facile
 ‘enumerari non possunt propter multitudinem sui. ideo
 ‘autem dixi *sui natura*, quia secus est si res non possunt

¹ Omit *omnium* Cai.

² Insert *mixta* Sp. Pap. Ven. Y. Z. Cai.-Bas.

³ Bracton begins to diverge so far from Azo that we omit what Azo says
 of *inventio* and *traditio*.

[II. 4. § 1.] Adquiratur etiam iure civili multis modis, [f. 10 b] videlicet ex causa donationis, ex causa successionis, ex causa testamentaria, et aliis pluribus modis, secundum quod inferius dicetur. Adquiratur etiam res corporalis per traditionem, quia ¹ res corporalis traditionem patitur, quod non faciunt res incorporales, ut sunt iura. Et quid sit traditio et quae sufficiant pro traditione, dicetur infra plenius de donationibus.

[II. 4. § 2.] ‘Est et alia divisio rerum, et de qua
‘superius dicitur in parte, quod aliae sunt corporales aliae
‘incorporales. Corporales sunt hae quae sui natura tangi

¹ quae Dig. Ed.

‘tangi propter casum vel difficultatem accidentem, ut si
 ‘res cecidit in profundum maris vel fluminis. ergo ea
 ‘quae sunt’ in abyssu vel ‘infixa caelo corporalia sunt:
 ‘licet enim eas nullus tangere possit, tamen tangi pos-
 ‘sunt, id est, tangibilia sunt. Quid dicemus de fumo,
 ‘et de aere? et certe res sunt corporales. nam et aer
 ‘unum est ex quatuor elementis ex quibus omnia cor-
 ‘pora quae creantur constant. et idem est in eo quod
 ‘sumitur et remittitur a corpore in flatu vel anhelitu.
 ‘Incorporales autem sunt quae tangi non possunt,’
 nec aliis corporeis sensibus subiacent, ‘qualia sunt
 ‘ea quae in iure consistunt, ut hereditas, usufructus,’
 ‘obligatio, actio.’ Quid sit unumquodque istorum in
 specialibus subicietur rubricis. ‘nec obstat quod in here-
 ‘ditate’ ‘corporales res continentur. nam et quod ex
 ‘aliqua obligatione nobis debetur plerumque corporale est,
 ‘veluti fundus, homo, pecunia. sed ipsum ius hereditatis,
 ‘id est, ipsum ius quod est hereditas,’ ut intransitive
 ponantur illa verba *ius hereditatis*, ‘incorporale est.’ et
 ita dico et expono in ‘iure utendi et fruendi et in iure obli-
 ‘gationis. Eodem numero continentur etiam iura prae-
 ‘diorum urbanorum¹ vel rusticorum,’ ut in. e. Forte ‘et
 ‘res incorporales sunt quae in iure non consistunt ut
 ‘genera et species et calodaemones et cacodaemones et
 ‘animae hominum et anima mundi.’ sed de his ideo
 exemplum non datur, quia ad leges non pertinent.

De servitutibus [Inst. 2. 3].

‘Quia servitutes inter alias incorporales res connu-
 ‘merantur,’ ut dictum est in superiori titulo, ‘ponit de
 ‘servitutibus. Et est sciendum quod hic non tractat de
 ‘servitute qua homo fit servus hominis.’ de ea enim
 specialiter posuit supra *de iure personarum*. ‘sed tractat
 ‘de ea qua subicitur praedium praedio,’ et illa potest dici
 habitus praedii. vel forte definitur ‘ad similitudinem

¹ Insert *urbanorum* Bas.

‘ possunt, qualia sunt fundus, homo, vestis, aurum, argentum et aliae res innumerabiles quae omnes numerari non possunt propter earum multitudinem. et ideo dicitur *natura sui*: licet res tangi non possit propter casum forte, quia res cecidit in profundum maris, vel propter difficultatem sicut stellae caelo infixae, et quae res corporales sunt, licet tangi non possunt praedictis rationibus, tamen tangibilia sunt. Item corporales res sunt fumus et aer. est enim aer unum ex quatuor elementis ex quibus omnia corpora¹ constant et creantur. illud idem etiam est quod assumitur et remittitur a corpore, sicut flatus et anhelitus. Incorporales vero res sunt quae tangi non possunt, qualia sunt ea quae in iure consistunt, sicut hereditas, usus-fructus,’ advocaciones ecclesiarum, ‘ obligationes et actiones et huiusmodi. nec obstat quod in hereditate,’ usufructu et huiusmodi ‘ corporales res contineantur, nam quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia et huiusmodi. sed ipsum ius hereditatis, id est, ipsum ius quod est hereditas, incorporale est. et ita dicendum est de iure utendi fruendi’ et iure advocacionis ‘ et obligationis et etiam de iure rusticorum praediorum. Incorporales etiam res sunt, licet in iure non consistent, sicut sunt genera et species, calodaemones et cacodaemones, anima mundi et animae hominum.’

[II. 4. § 3.] ‘ Quia vero servitutes communerantur inter alias res incorporales, videndum hic² de servitutibus. Est enim quaedam servitus qua homo fit³ servus hominis, sed de ea non tractatur hic,’ ‘ sed de ea qua subicitur praedium praedio. fit tamen ad similitudinem eius qua homo sit servus hominis, ut sicut ista constitutio dicitur

¹ *omnia communia* Ed.

² *videndum est* Vulg.

³ *fit* Ed. Vulg.; *sit* Dig. Cr.

‘ superioris qua homo fit servus hominis, ut sicut illa
 ‘ dicitur constitutio iuris gentium qua quis dominio ¹ alieno
 ‘ contra naturam subicitur,’ ut supra *de iur. person.*
 § *servitus* [Inst. 1. 3. § 2], ‘ ita et ista dicatur consti-
 ‘ tutio qua domus domui vel rus ruri subiugatur, et ita
 ‘ dicuntur servitutes urbanae et rusticae. Quae istae sint
 ‘ et quis constituat et cui et qualiter et qualiter amittantur,’²
 dic ut notavi in Summa C. e. t. [C. 3. 34].

¹ *domino* Sp.; *dominio* Cai.

² *admittantur* Sp. and omit the second *et qualiter*, which stands in Cai.

‘ ius gentium ¹ qua ² quis dominio alieno contra naturam
‘ subicitur, et hoc idem dicatur de servitute sive constitu-
‘ tione qua domus domui et rus ruri subiungitur, et ita [f. 11]
‘ dicuntur servitutes urbanae et rusticae. et quae istae
‘ sunt et quis eas constituat et cui et qualiter, et cum
‘ constituentur qualiter amittantur ’ inferius dicetur.

¹ *illa dicitur constitutio iuris gentium* Azo.

² *quasi* Vulg.

II.

BRACTON ON THE LAW OF ACTIONS.

NOTE.

The portion of Bracton's text that we have already printed corresponds closely to the first portion of the Institutes. We have dealt with the generalities of jurisprudence [= Inst. 1. 1-2], with the Law of Persons [= Inst. 1. 3-26, though there is little to represent tit. 13-26], the classification of things and the 'natural' modes of acquiring ownership [= Inst. 2. 1-2]. We have also said a few words of incorporeal things and of servitudes [= Inst. 2. 2-3]. In the Digby MS. the break which occurs at the point at which we have arrived is strongly marked. We have come to the end of the first quire and find a page of parchment that has on it only a line and a half of writing (*et rus ruri subiungitur . . . qualiter amittantur inferius dicetur*, above p. 133). And now a new hand begins a new quire. We may infer that in Bracton's own MS. a break occurred here. The part of it which consisted mainly of excerpts from Azo lay apart at one time from the rest. We can almost hear the *Laus Deo!* that he uttered as he turned from alien matter that he did not well understand to the practical English law of feoffments that he administered. This is how he dashes into a new and more congenial part of his work:—'Quoniam inter alias causas adquisicionis magna, celebris et famosa est causa donationis.' Here at length speaks the English justice.

However, through this part of his work we are not to follow him on the present occasion. It deals with feoffment, inheritance, dower, wardship, marriage, aids, and reliefs, and is intended to be roughly parallel to Inst. lib. 2, tit. 7-25, and lib. 3, tit. 1-12. Having ended this section of his work, he ought (if he is to resume the Institutional order) to take up the subject of Obligations; to this Justinian has devoted the second half (tit. 13-29), of his third book, and the first titles (1-5) of his fourth; whence (Inst. 4. 6) he passes to the Law of Actions. Now Bracton at once passes to the Law of Actions. He has some excuse for doing so. The whole of private law, so he has learnt, can be brought under the three heads, Persons, Things, Actions; and it seems to him that the treatment of Obligations comes more

naturally under the third than under the second of these three. So he here opens a new section of his work by a discussion of the generalities of the Law of Actions. If he had been scrupulously following the arrangement of the Institutes, his labours at this point would be near their end. He would only have to supply an equivalent for the last thirteen titles. But this is not really his position. For one thing, he has skipped over that large section of the Institutes which deals with Obligations, and this must be represented, at all events by a few lines. For another thing, by far the greater part of all that he wishes to tell us about the law of England is yet unsaid, and he will have to introduce it in long sections, or rather books, devoted to particular *actiones*, such as the appeal of felony, the assize of novel disseisin, and the writ of right. However, with Azo's Summa at his elbow, he will now take up the title *De actionibus* (Inst. 4. 6) and see what he can make of it.

We shall here print (with an exception, that will be explained below) the whole of what in the Vulgate version bears the title *de Actionibus*. We shall indicate by inverted commas the matter that is taken either from Azo or from the Institutes. Though this part of his work is highly Romanised, it is no longer possible for us to put Bracton and Azo on opposite pages, for when the Englishman has followed the Italian but a little way through the generalities of the Law of Actions, he discovers that he must introduce what he has to say of the Law of Obligations, and that for this he had better look to the Institutes themselves. At the end of each piece of Bracton's text we shall append some notes touching its origin.

We have come to one of those quires of the Digby MS. which have no marginalia, and we shall see that a good many sentences that are found in other MSS. are altogether wanting. Bracton seems to have found the work of picking and choosing sentences from the Institutes a difficult task, and to have returned to it after he had made a first draft of his book.

De Actionibus.

[III. 1. § 1.] ‘Dictum est supra de personis et rebus, [f. 98b]
‘nunc autem dicendum est de actionibus. Et videndum
‘quid sit actio’ et unde oriatur et qualiter dividatur et
qualiter proponatur et intentetur et qualiter proposita
fundetur et qualiter fundata probetur. Quid sit actio?
Et sciendum quod ‘actio nihil aliud est quam ius perse-
‘quendi in iudicio quod’ alicui ‘debetur.’ ‘*Ius* autem
‘ponitur ad differentiam eorum quae non sunt iuris’¹ vel

¹ *non sunt ius* Azo.

eorum qui,¹ quamvis ius habeant et actionem, elidi tamen poterunt² per legitimam exceptionem contrapositam. 'vel 'dicitur ius ad differentiam officii iudicis,' quod latissimum est 'et non³ actio.' multa enim expediuntur per officium iudicis quae non expediuntur iure actionis, 'et ius non est 'ipsum officium, sed appellari poterit factum.' 'Sed si 'sit qui quaerat cur dicatur quis persequi per actionem 'cum proponat actionem iniuriarum, cum ibi ex officio 'iudicis summa constituatur, respondeo, Bene potest dici 'actio cum agitur ex iniuria, et est ratio, quia habet querens 'ius querendi et petendi et⁴ aliquid ei debetur. Si quaeras 'quid, respondeo, Id videlicet quod querens aestimaverit. 'nam antequam querens in iudicio conqueratur, aestimare⁵ 'poterit iniuriam sibi factam,' scilicet quale damnum sustinuerit, ex qualitate facti et iniuriae enormitate. quae quidem aestimatio, si iniusta fuerit vel superflua, 'bene 'permittitur iudici ex officio suo summam quam querens 'aestimavit moderare et minuere,' non autem augere, nisi forte ita sit quod ille de quo queritur se gratis posuerit in voluntatem et gratiam⁶ conquerentis. et quo casu aestimatio et taxatio erit in voluntate conquerentis et aufertur iudici officium et potestas taxandi. 'Item dicitur *persequendi*.⁷ hoc autem ponitur ad differentiam exceptionis, 'qua non persequimur alium, sed magis ab alio persecuti 'nosmet ipsos defendimus, licet in exceptione partes actoris 'sustineamus. Item de eo quod dicitur *in iudicio*, hoc 'etiam ponitur ad differentiam eorum quae non in iudicio 'sed extra persequimur, sicut furem nocturnum vel diurnum,' sicut praedonem vel alium, et ubi⁸ licebit unicuique se sine iudicio vindicare, hoc excepto, quod si tales vivi capiantur, vita et mors et membra pertinent ad regem. 'Item, *quod sibi debetur* ponitur ad differentiam criminalium

¹ *qui* Dig. Reg. Ed.; *quae* Vulg.

² *poterit* Dig. Cr. Reg.; *poterunt* Vulg.

³ *Sic* Dig. Cr. Reg.; *insert est* Vulg.

⁴ *et* Dig. Corb. Ed. Cr.; *si* Vulg.

⁵ *Sic* Dig. Ed. Reg.; *insert non* Vulg.

⁶ *Sic* Dig. Ed. Cr.; *insert ipsius* Vulg. ⁷ *prosequendi* Ed. Cr. Reg. Vulg.

⁸ *ubi* Dig. Ed. Reg.; *non* Corb. Cr. Vulg.

‘actionum, quibus non solum mihi debitum persequor, sed
‘cuilibet de populo,’ proper pacem regis et communem
utilitatem.

NOTES.

This paragraph is excerpted from the following passage, in which Azo begins his discussion of that title of the Institutes (4. 6) which is devoted to Actions.

Azo, Summa Instit. De Actionibus.

Explicuimus de obligationibus, et quia ex his oriuntur actiones tanquam ex matribus, audiamus de actionibus. vel aliter:—‘Expedi-
‘vimus supra de personis et rebus. sequitur ut videamus de actionibus’ secundum ordinem assignatum supra *de iure naturali* §. ult. [Inst. 1. 2. § 12]. ‘Videndum ergo quid sit actio’ et qualiter distinguatur. Est ‘autem actio nihil aliud quam ius persequendi in iudicio quod ‘sibi debetur,’ ut in. e. in prin. [Inst. 4. 6 pr.]. ‘*Ius* autem ponitur ‘ad differentiam eorum quae non sunt ius,’ ut omnium corporalium, sicut dicunt quidam: ergo secundum hoc ponitur ad differentiam asinorum et pecudum. ‘vel’ melius:—*ius* dicit ad differentiam ‘officii iudicis,’ ‘quod non est actio,’ ut ff. *de minor*. l. *quod si minor* §. ult.

[D. 4. 4. 24. § 5. Ex hoc edicto nulla propria actio vel cautio proficiscitur: totum enim hoc pendet ex praetoris cognitione.] licet quidam dicant contrarium. ‘non enim ius est ipsum officium,’ sicut cuilibet patet, ‘immo potius potest appellari factum,’ et ita dicimus¹ per illud verbum *ius* excludi omnem extraordinariam cognitionem, sive pro salario advocatorum vel procuratorum vel similibus interponatur. dicitur ergo officium iudicis² cura vel sollicitudo debita ratione iurisdictionis ad aliquid agendum vel prohibendum. in clericis vero debita est ratione ordinis, et sic appellatur cura in *C. de episcopa. au. et de di. ea. ad ius et cur. et re. po. per.* [C. 1. 4 de episcopali audientia et diversis capitulis quae ad ius curamque et reverentiam pontificalem pertinent]. et habet³ haec cura quasi pedissequa quaedam deservire iurisdictioni quasi dominae suae. ‘Quaeret aliquis:— ‘Cur ego⁴ dicar persequi per actionem cum propono actionem ‘iniuriarum, cum ibi officio iudicis summa constituatur? Re- ‘spondeo:—Bene potest dici actio cum ago ex iniuria. et est ratio, ‘quia ius petendi habeo et aliquid mihi debetur. Si quaeras quid, ‘respondeo:—Quod ego aestimavero: nam et antequam in iudicio ‘conquerar aestimare possum iniuriam mihi factam, licet iudici per- ‘mittatur minuere summam quam aestimavi.’ ‘*Persequendi* autem ‘ponitur ad differentiam exceptionis, qua non persequimur alium⁵ sed

¹ *dominis* Sp.

² Cai.; omit *iudicis* and insert *i.* [= *id est*] Gonv. Sp.

³ *debet* Bas.

⁴ *ergo* Sp.

⁵ Gonv. Cai.; *aliud* Sp.

'magis ab alio persecuti nos defendimus, licet in exceptione partes 'actoris' sustineamus. In iudicio autem ponitur ad differentiam 'eorum quae non in iudicio sed extra persequimur, ut furem nocturnum vel diurnum' vel agrorum depopulatorem vel desertorem militiae, ut ff. *ad l. Aquil.* l. iij. et C. *quando licet unicuique se vi. si. iudice* l. i. et ii. [D. 9. 2. 4; C. 3. 27. 1 et 2]. 'Quod sibi debetur' ponitur ad differentiam criminalium actionum, quibus non mihi 'debitum, sed cuilibet de populo, persequor.' et secundum hoc etiam actionem in rem definiri dicemus. licet enim possessor non sit obligatus, ut in. e. § 1 [Inst. 4. 6. § 1], attamen realiter non personaliter dicitur mihi deberi. hoc enim verum est quod res ista debet mihi restitui, et ipse tenetur mihi ad restitutionem rei actione in rem proposita contra eum. vel dicas quod verbum *debendi* excludat realem actionem, quae proprie dicitur petitio. largissime tamen supponit *actio* nedum pro reali actione, sed etiam pro iudicis officio, ut ff. *de act. et ob. l. actio in personam* et l. *actionum genera* et l. *actionis verbo*.

[D. 44. 7. 28. Actio in personam infertur: petitio in rem: persecutio in rem vel in personam rei persequendae gratia.

D. 44. 7. 25. Actionum genera sunt duo: in rem, quae dicitur vindicatio, et in personam, quae condictio appellatur.

D. 44. 7. 37. Actionis verbo continetur in rem, in personam, directa, utilis: praeiudicium, sicut ait Pomponius: stipulationes etiam quae praetoriae sunt, quia actionum instar obtinent, ut damni infecti, legatorum et si quae similes sunt. interdicta quoque actionis verbo continentur.]

Nec admitto opinionem P[laacentini]² ut causa debendi dicatur actio. sed dicitur ius quo, ut dictum est, (non *propter quod*)³ *persequimur*, ut hic. et consimilia notavi ad maiorem evidentiam definitionis in summa C. *de eden.* in prin. usque ad illum § *sed dicet*, et in illo § *dicet* [Azonis Summa Cod. 2. 1]. Differentia etiam quaedam modicissima olim poterat notari inter actiones et interdicta, quae erat in solemnitate verborum. sed illa hodie non habet locum, ut notavi in summa C. *de interdictis* § *si quaeras* [Azonis Summa Cod. 8. 1.].

It will be seen that Bracton here follows his guide pretty closely and has introduced little that is his own. Azo is commenting on the classical definition of an *actio*. An *actio* is called a right, a *ius*. According to some this is said in order to mark off the *actio* from things that are not rights, such as corporeal things, and we are thus, says Azo with some scorn, to distinguish an action from asses and cattle. It would be better to hold that we are called upon to distinguish an *actio* from the *officium iudicis*. This contrast Azo illustrates by various citations. Bracton cuts the discussion short. We

¹ Gov. Cai.; auctoris Sp.

² causa pe. Pap.; causa Pe. Ven.; Pet. Bas.

³ The bracket and italics are the editor's. Azo means that the *actio* is a *ius quo* (not *propter quod*) *persequimur* &c. He has argued this out in his longer Summa.

may perhaps render his words thus:—‘An action is called a right, by way of contrast (1) to cases in which there is no right, or (2) to cases in which, though there is a right of action, it is one which can be met and avoided by a special plea (*exceptio*), or (3) to cases which are subject to those wide powers which are exercised by the judge *ex officio*; and many cases are terminated by the judge acting *ex officio*, and in these no right of action is enforced, and the judge’s power or duty in such a case we cannot call a matter of right: it is much rather a matter of fact.’ The second of these three contrasts seems to be introduced by Bracton. He wishes to mark off the cases in which a man has a right of action which he can prosecute successfully, from those in which (according to the theory of pleading that was then in vogue) a man may be said to have a right of action, but his action will not be successful if the defendant encounters it with an ‘exception’ or special plea. Then, following Azo, Bracton also desires to mark off cases in which I have a true right of action from those in which some judge may exercise a discretionary power of interfering and instituting proceedings which will benefit me. The procedure of the Canon Law gave prominence to the *officium iudicis*. In many cases the judge ordinary might *ex officio* set the law in operation either ‘of his own mere motion’ or ‘on the promotion’ of another person.

Azo is next concerned with the words *persequendi quod sibi debetur*. Is it true that every right of action is a right to require something that is due? Can I be said to demand my due when I ask for ‘unliquidated damages,’ the amount of which will be fixed by the judge? Yes I can. Bracton follows his leader. ‘The action based on an *iniuria* is an action, for the plaintiff has a right to complain and to demand, and something is due to him. You ask, What is due to him? I answer, the amount at which he appraises the wrong; for before he appears in court he can appraise the wrong, and, though the judge may reduce this amount, if he thinks it exorbitant, he can not increase it, unless indeed it happens that the defendant throws himself on the plaintiff’s mercy, and in that case the plaintiff himself will tax the damages and the judge will have no power to reduce them.’ This is an amplification of what Azo says. The submission of the defendant to the plaintiff’s mercy is apparently a trait of English practice. It would be a graceful way of ending a hopeless struggle, and sometimes would meet with its reward. However, the main point is that a right to sue for unliquidated damages is ‘a right to require what is due’ within the meaning of the classical definition.

Then as to *persequendi*, Azo remarks and Bracton repeats that this word is introduced to mark off a right of action from a right of ‘exception’: that is, a right which can be made good merely by way of defence, not by way of attack. This remark is necessary because, as is well known, the person who sets up an ‘exception’ is in many respects treated as a plaintiff.

Next we pause on the words *in iudicio*. The right to pursue and arrest a thief is not an action or right of action; such a pursuit does not take place *in iudicio*, in court. Bracton speaks of our pursuing *furem nocturnum vel diurnum sicut praedonem vel alium*. Azo to the *fur* adds the *depopulator agrorum* and the *desertor militiae*. Bracton's remark that in these cases one is allowed to right oneself, but that, if the thief be caught, life, death and member belong to the king, has no equivalent in Azo's book, and has been made unintelligible in the Vulgate text by a misplaced *non*.

Finally, the *quod sibi debetur* must be discussed. It may, thinks Azo, exclude criminal actions, in which I demand what is due, not to me, but to everyone. Bracton copies this and then adds 'because of the king's peace and the common weal.' Azo, however, has other suggestions to make of which the Englishman takes no notice. He has some doubts as to whether an *actio in rem* can be brought within the definition, and remarks that *actio* can be used in a narrow sense by way of contrast to *petitio*: but on the whole it seems that the possessor against whom I bring an *actio in rem*, though he is under no obligation to me, does owe (*debet*) me something, and something is owed to me; *realiter non personaliter dicitur mihi deberi*.

Here the courses of our two writers diverge. Azo, after a brief reference to the obsolete distinction between *actiones* and *interdicta*, proceeds to the various classifications of actions, and these he exhibits in great detail. *Actiones* are (1) *praetoriae* or *civiles*, (2) *in rem* or *in personam* or *mixtae in rem et in personam*, (3) *comparatae sola gratia persequendae rei*, or *poenae persequendae*, or *mixtae*, (4) *in simplum*, or *in duplum*, or *in triplum*, or *in quadruplum*, (5) *bonae fidei* or *stricti iuris*, (6) *perpetuae* or *temporales* (7) *transitoriae in heredes* or *non transitoriae*, (8) *famosae* or *non famosae*, (9) *directae* or *utiles*, (10) *directae* or *contrariae*, (11) *universales* or *singulares*, (12) *simplices* or *duplices*. To these twelve classifications he adds some others which he says are less useful. He then tells us how his master (*dominus meus*) had taught him to draw a tree (*arbor*) or pictorial scheme of actions; in the midst of which stood Jurisprudence like a queen with a lily in her hand. This is the Arbor Actionum of Johannes Bassianus; the various actions to the number of 169 are represented as fruits depending from its branches (see Savigny, *Gesch. d. R. R.* vol. iv. § 91.) The long discussion, which is thus brought to a close, is of an exceedingly technical character. About every single action known to Roman law one ought to be able to make twelve different assertions, thus assigning to it its place in a twelvefold classification; and, though Azo does not attempt the whole of this enormous task, he has many problems to face, about some of which the legists of his day were divided.

Bracton sees that he must not enter this maze. He takes a quite different course.

[III. 1. § 2.] Videndum est etiam unde actio oriatur. [1. 99]
 ‘Et sciendum est quod ex obligationibus praecedentibus
 ‘tanquam a matre filia. Obligatio autem, quae est mater
 ‘actionis, originem ducit et initium ex aliqua causa praee-
 ‘dente, sive ex contractu vel quasi, sive ex¹ maleficio vel
 ‘quasi.’ Ex contractu vero oriri poterit multis modis,
 sicut ex conventionem, per interrogationes et responsiones,
 ex verborum conceptione quae voluntates duorum in unum
 trahit consensum, sicut sunt pacta conventa, quae nuda
 sunt aliquando, aliquando vestita. quae si nuda fuerint,
 exinde non sequitur actio, quia ex nudo pacto non nascitur
 actio. Oportet igitur quod habeat vestimenta, de quibus
 inferius dicendum.² et huiusmodi causa ex contractu vel
 quasi, semper erit civilis. Item nascitur obligatio ex male-
 ficio vel quasi, et maleficio provenit ex delicto et iniuria,
 quae quidem sub se plures continet species: ut si quis
 crimen laesae maiestatis commiserit, homicidium, vel
 furtum, et huiusmodi: vel quasi ex maleficio, ut si iudex
 scienter male iudicaverit, ‘obligatus esse videtur quasi ex
 ‘delicto, sed quia neque praecise ex maleficio, neque ex
 ‘contractu obligatus est, et aliquid peccasse intellegitur, licet
 ‘per imperitiam, ideo videtur quasi ex maleficio teneri.’

NOTES.

Having defined an *actio*, Bracton proceeds to ask whence rights of action (*actiones*) arise. His answer is that they are born of preeedent obligations, and that therefore we must discuss the nature of obligations. He here leaps back from Azo's chapter on actions to his much earlier chapter on obligations. The remark that actions are born of obligations is duo to Azo. He makes it when he first turns to obligations, and he is impelled to it by the scheme of the Institutes. Law deals with persons, actions, things; we have spoken of persons and things; we must now speak of actions; but as actions are born of obligations, we must first deal with obligations. Thus, at any rate at this moment, Azo regards the large traet of the Institutes which is devoted to obligations as belonging rather to the Law of Actions than to the Law of Things. This leaves its mark on Bracton's work; indeed, as already said, Bracton goes further in the direction indicated by Azo. With

¹ Omit *ex Dig.*

² Insert *est Yulg.*

Bracton the Law of Obligations is definitely brought under the title *De Actionibus*. A further consequence follows:—Bracton stands committed to the doctrine that every action arises out of an obligation. He does not hold this doctrine consistently, but still it lies on the very surface of his book, visible to the eye of everyone who does not care to look below the surface. Our endeavour in modern times to get on without ‘real’ actions, and to classify all practicable actions under the heads of contract and tort, seems to be predestinated by Azo and Bracton.

Azo’s treatment of obligations in his *Summa* of the Institutes is brief and unsatisfying, for it consists very largely of references to his longer work on the Code. Thus, to take the first example—‘We must therefore see what is an obligation, how obligations arise, how they are classified; as to all this you may say (*dic*) what I have noted in ‘my *Summa* of the Code *de act. et oblig.* down to § *circa*.’ The *Summa* of the Institutes, therefore, Bracton cannot copy. On the other hand, the treatment of obligations in the *Summa* of the Code is much too technical and detailed for transplantation. Those generalities of which Bracton is in want are buried away beneath matter which could not be of any use in England. Consequently, he turns to the Institutes themselves. The fourfold division of obligations he obtains from Inst. 3. 13. 2. His remark about nude and vested pacts he will explain in the next section. When he says that actions arising *ex contractu vel quasi* are always *civiles*, the contrast to *civiles* is *criminales*. His example of an obligation arising *quasi ex maleficio* he takes from Inst. 4. 5 pr.: ‘*si iudex litem suam fecerit.*’

[III. 2. § 1.] Cum autem nascentur actiones ex obligationibus quae ex contractu, vel quasi, substantiam capiunt, et non ¹ ex maleficio vel quasi, videndum est inprimis quid sit obligatio et qualiter contrahatur et per quae verba, et per quas personas adquiritur obligatio et qualiter dissolvatur et tollatur, et qualiter cum fuerit dissoluta renovetur, et qualiter in aliam personam transfundatur, et qualiter una obligatio in aliam mutetur.

Et ² sciendum quod ‘obligatio est iuris vinculum quo ‘necessitate astringimur’ ad aliquid dandum vel faciendum, ut si quis ligatus fuerit et astrictus alicui ad aliquid, et ille alius ei ad aliud contra obligatus. Est enim obligatio quasi

¹ *et etiam* Vulg.; *et non* Dig. Corb. Ed. Cr. Reg. The Vulgate text seems at first sight to be the more intelligible; but probably the MSS. are right.

² *Sic* Dig. Ed. Cr. Reg.; insert *primo* Vulg.

contrahitio et quatuor habet species quibus contrahitur et plura vestimenta. Contrahitur enim re, verbis, scripto, consensu, traditione, iunctura, quae omnia dicuntur vestimenta pactorum.

NOTES.

Braeton turns from Actions to Obligations, and in the first instance will speak only of those which arise *ex contractu*. It is not improbable that the classical use of *obligatio* perplexes him. This word is only known to English practitioners as the word which describes a bond, a written and sealed confession of a debt. How, then, can bonds arise *ex maleficio*? After a few lines, in which he alludes to the classical definition of *obligatio* (Inst. 3. 13 pr.), he introduces us to the theory that pacts require vestments. A pact may be vested in one of six garments, or, in other words, a contract may be made *re, verbis, scripto, consensu, traditione, iunctura*. The first four of these vestments are well known to us. By *traditione* he refers to the so-called 'innominate' contracts, and by *iunctura* to the *pacta adiecta*. This nomenclature seems due to someone who has been writing poetry.

Re, verbis, scripto, consensu, traditione,
iunctura, vestes sumere pacta solent.

These lines Braeton has already quoted in an earlier part of his book (f. 16 b). Whence they come we do not know; we have not found them in Azo's book, and the terms that they employ (*traditio, iunctura*) are not quite those that he uses. His theory of vestments is given in his Summa of the Codo (2. 3), where he speaks thus:—'Vestitur autem pactum sex modis: re, verbis, consensu, litteris, contractus cohaerentia, rei interventu.' Here his *cohaerentia* is Braeton's *iunctura*, and his *rei interventus* is Braeton's *traditio*. A picturesque passage follows. 'Et est notandum quod pactum quatuor primis modis dicitur vestitum sic, ut nullo tempore fuerit sine illis vestimentis, et haec vestimenta cum suo esse incipit habere. ultimis vero duobus modis vestitur post nativitatem. cum enim paeiscimur, pactum quidem sui nativitate nudum est, sicut optime probatur ex continuatione duorum paragraphorum ff. e. l. iur. § *si cum*, et § *quin immo* [D. 2. 14. 7. §§ 4. 5], sed, cum natum est, ante et retro aspicit et oculos aperit an praecesserit vel sequi possit vel statim insit aliquis contractus,¹ cuius variis et grisiis² induatur ut boream rabiemque procellae expellat, et suum suo domino in agendo³ auxilium praebeat. pactum enim incontinenti factum, id est, paululum ante contractum vel paululum post contractum vel in ipso contractu—nec distinguo sit bonae fidei vel stricti iuris, ut ff. *si certum petatur* l. *lecta* [D. 12.

¹ Sp. Pap. Ven. Bas. Gonv.

² Insert *pennis* (seu *vestibus*) Bas.

³ *agendo* Gonv.; *augendo* Sp.

' 1. 40]—praescriptis verbis actionem dat, ut in. *de pactis inter empt. et ven.* l. i.,¹ et in c. l. *petens*, et l. *in bonae fidei* [C. 4. 54. 2; C. 2. 3. 27 et 13], scilicet, ad interesse si quis alius erat contracturus ut in. *de rescin. ven.* l. *ea conditione* [C. 4. 44. 14.], aut si alius non erat venditurus, repetit quod dederit, ut in. *de pact. inter empt. et ven.* l. *cum te* [C. 4. 54. 6]. . . . Rei intervntu vestitur, ut in contractibus innominatis, qui ab initio nullam dant actionem: sed, re postea interveniente et tradita, competit actio ei qui rei intervntu vestivit contractum, non alii, scilicet, praescriptis verbis ad interesse, et condictio ob causam ad repetendum quod datum est, ut ff. *de praescrip. ver.* l. *natural.* § *sin autem rem do*, et in. *de condi. ob c. l. si ut proprio*,² et in. *de rerum permu.* l. *quum* et l. *emptionem* et l. *rebus*, et ff. e. l. *divisionis*, et l. *in traditionibus*, et l. *nemo* [D. 19. 5. 5. § 1; C. 4. 6. 2; C. 4. 64. 4 et 6 et 7; D. 2. 14. 45 et 48 et 61].'

This extract will be sufficient to show the general drift of Azo's theory of vested pacts. We have the well-known four garments (*res, verba, litterae, consensus*) and two others, namely *cohaerentia contractus* and *rei interventus*. In four cases a pact comes into the world vested; in other two cases, though it is born naked, it opens its eyes, looks before and behind and finds a robe which will protect it from the fury of the storm. In the *rei interventus* we see the vestment of the innominate contracts and the *traditio* of Bracton's hexameter. (Notice Azo's 'sed re postea interveniente et tradita.') The vestment of the innominate contracts is 'part-performance,' and the typical case of part-performance is a *traditio rei*. Then the *iunctura* of the pentameter is Azo's *cohaerentia contractus*. The shivering pact succeeds in wrapping itself up in the warm furs, the vair and grise (*variis et grisiis*) of a well-clad contract, and thus becomes *pactum adiectum*. Such is our philosophy of clothes.

Having thus obtained a scheme for the law of contracts, Bracton must speak of the vestments one by one, and for an account of them he will go to the Institutes themselves. He begins with *Res*.

[f. 99] [III. 2. § 1 cont.] 'Re autem contrahitur obligatio veluti³ ' mutui datione' 'quae consistit in rebus quae pondere, numero, mensura sunt': pondere, sicut in rebus quae ponderantur: numero, sicut 'pecunia numerata': pondere,⁴ 'aere, argento et auro': mensura sicut in 'vino, oleo, frumento,' 'quae res autem in appendendo, numerando, metiendo in hoc dantur ut statim fiant accipientium. quia mutuum proprie dicitur id quod ex meo fit tuum, et quandoque non eadem res sed aliae eiusdem naturae redduntur creditori.

¹ *ii.*, not *i.*, Bas.

² Insert in Vulg.

³ Corr. *si ut proponis*.

⁴ *Sic* Dig. Corb. Ed. Cr. Reg. Vulg.

‘ Is ¹ autem cui res aliqua utenda datur, re obligatur quae
 ‘ commodata est. sed magna differentia est inter mutuum
 ‘ commodatumque,’ ‘ quia is qui rem’ commodatam ²
 ‘ accepit’ ad ipsam restituendam tenetur vel eius pretium
 ‘ si forte incendio, ruina, naufragio aut latronum hostiumve [f. 99 b]
 ‘ incursu consumpta fuerit vel deperdita,’ subtracta vel
 ablata. Et ‘ qui rem utendam accepit’ ‘ non sufficit ad rei
 ‘ custodiam quod talem diligentiam adhibeat qualem suis
 ‘ rebus propriis adhibere solet, si alius eam diligentius
 ‘ potuit custodire. ad vim autem maiorem vel casus for-
 ‘ tuitos non tenetur quis nisi culpa sua intervenerit,’ ut ‘ si
 ‘ rem sibi domi commodatam ³ secum detulerit cum peregre
 ‘ profectus fuerit, et illam incursu hostium vel praedonum
 ‘ vel naufragio amiserit, non est dubium quin ad rei resti-
 ‘ tutionem teneatur. commodata autem res dicitur ad
 ‘ commodum data, et proprie dicitur commodata cum nulla
 ‘ mercede accepta res utenda datur. gratuitum enim esse
 ‘ debet commodatum, et si merces intervenerit potius dici
 ‘ debet locatio et conductio quam commodatum. Is, apud
 ‘ quem res deponitur, re obligatur, et de ea re quam accepit
 ‘ restituenda tenetur,’ et etiam ad id, ‘ si quid’ in re deposita
 ‘ dolo commiserit. culpa autem nomine non tenetur, id
 ‘ est ⁴ desidiae vel neglegentiae,’ ‘ quia qui neglegenti amico
 ‘ rem custodiendam tradit,’ sibi ipsi et ‘ propriae facilitati’
 ‘ hoc debet imputare. Creditor qui pignus accepit re
 ‘ obligatur et ad illam restituendam tenetur, et cum huius-
 ‘ modi res in pignus data ⁵ utriusque gratia, scilicet
 ‘ debitoris, quo magis pecunia ei crederetur, data sit, et
 ‘ creditoris, quo magis ei in tuto sit creditum, sufficit ad
 ‘ illius rei custodiam exactam diligentiam adhibere : quam si
 ‘ praestiterit et rem casu amiserit, securus esse poterit nec
 ‘ impediatur creditum petere.’

¹ *Is autem* Dig. Ed.; *Item autem* Corb. Reg. Cr.; *His autem* Vulg.

² Dig. Corb. Ed. Cr. Reg. Gl. Cher. St. Ha. Gray. Vulg. and all MSS. that have been examined.

³ *commodatam domi* Vulg.

⁴ *scilicet* Vulg.

⁵ *Sic* Dig. Cr. Reg.; *facilitati* Ed. Vulg.

⁶ *Insert sit* Vulg.

NOTES.

Bracton has taken up Inst. 3. 14, and has copied a very large part of that title. But, as is well known, the Vulgate text of his work (and we have not been able to improve that text materially) departs widely from its model at one important point. Bracton transfers to a case of *commodatum* words which in the Institutes are applied to a case of *mutuum*. (See Coxe's translation of Güterbock, pp. 141, 175.) The discrepance will be best shown by the following collation of the two texts :—

Inst.	Item	is	eui	res	aliqua	utenda	datur,	id	est
Bract.		Is autem	cui	res	aliqua	utenda	datur		
Inst.	commodatur,	re obligatur,					et tenetur commodati		
Bract.		re obligatur	quae	commodata est.					
Inst.	actione.	sed is ab eo qui mutuum accepit longe distat.							
Bract.		sed magna differentia est inter mutuum et commodatum.							
Inst.	namque non ita res datur, ut eius fiat, et ob id de ea re								
Bract.									
Inst.	ipsa restituenda tenetur.	et is quidem qui					<i>mutuum</i>		
Bract.		quia is qui rem					<i>commodatam</i>		
Inst.	accepit						si quolibet		
Bract.	accepit ad ipsam restituendam tenetur vel eius pretium						si forte		
Inst.	fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio,						incendio, ruina, naufragio,		
Bract.									
Inst.	aut latronum hostiumve incursu,								
Bract.	aut latronum hostiumve incursu consumpta fuerit vel deperdita,								
Inst.		nihilominus obligatus permanet. at is qui							
Bract.	subtracta vel ablata,						et qui		
Inst.	utendum accepit sane quidem exactam diligentiam custo-								
Bract.	rem utendam accepit								
Inst.	diendae rei praestare iubetur, nec sufficit ei								
Bract.		non sufficit ad rei custodiam quod							
Inst.	tantam diligentiam adhibuisse quantam suis rebus						adhibere		
Bract.	talem diligentiam adhibuit qualem suis rebus propriis adhibere								
Inst.	solitus est, si modo alius diligentior poterit eam rem								
Bract.	solet, si alius eam diligentius potuit								
Inst.	custodire: sed propter maiorem vim maioresve								
Bract.	custodire: ad vim autem maiorem vel								
Inst.	casus non tenetur, si modo non huius culpa								
Bract.	casus fortuitos non tenetur quis, nisi culpa sua								
Inst.	is casus intervenerit: alioquin si id quod tibi commodatum est								
Bract.	intervenerit: ut si rem sibi domi commodatam								
Inst.	peregre ferre tecum malueris et vel								
Bract.	secum detulerit cum peregre profectus fuerit et illam								
Inst.	incursu hostium praedonumve vel naufragio amiseris,								
Bract.	incursu hostium vel praedonum vel naufragio amiserit, non est								
Inst.	dubium non est quin de restituenda ea re tenearis,								
Bract.	dubium quin ad rei restitutionem teneatur.								

Three suggestions might be made about this passage:—(1) That Bracton correctly copied the text of the Institutes, but that subsequent copyists have distorted his words; (2) that he meant to give the sense of the classical passage, but did not understand it; (3) that he deliberately modified the Roman text in order to bring it into harmony with English law. Until a manuscript is produced which represents Bracton as saying substantially the same thing that the Institutes say, we must reject the first of these three theories. If a small emendation would make his words accord with their model, we might be willing to adopt it. But the simple device of changing his *commodatum* into *mutuum* would not have the desired effect. This will be apparent if we have regard to those little words which serve to express the connexion between the various clauses. (Observe the structure of the clause which in the Institutes begins with *at is qui utendum accipit sane quidem*, and in Bracton's book with *et qui rem utendam accipit*; observe also the substitution of *ut si* for *alioquin si*.) Not a few strokes of the emendator's pen would be necessary were he bound to restore the substance, to say nothing of the very words, of the original passage. Between the other two explanations the reader will make his choice. Very likely they should be combined. It is probable that in accordance with the old Germanic law Bracton was inclined to impose upon the commodatary an absolute, or almost absolute, liability for the return of the goods lent. To hint that he may not be bound where there has been *vis maior* or *casus fortuitus* is a concession to Romanism, and one from which a deduction is at once made, a deduction which in Bracton's eyes may justify his previous statement that even in the case of shipwreck or of hostile incursion the commodatary remains bound. Again, it is probable (though to explain this would take us far afield) that in time past the pecuniary character of cattle, the typical chattels, had concealed from Englishmen the difference between *mutuum* and *commodatum*; even in Bracton's day and much later days the English commodatary is never compelled to return the very thing that has been lent him, if he prefers to pay its value in money. On the other hand, we can hardly attribute to Bracton a full knowledge of what he is about when he distorts the words of the Institutes. His prepossessions prevent him from understanding the text that lies before him, and he thinks that by a few small changes he can make it clearer, at all events shorter; and brevity about these not very important matters (for such they seem to him) is desirable, when the vast mass of practical English law has yet to be expounded.

[III. 2. § 2.] ‘Verbis contrahitur obligatio per stipulationem.’ ‘est enim stipulatio quaedam verborum conceptio
‘quae consistit ex interrogatione et responsione’ ‘ut si
‘dicatur: promittis? promitto. dabis? dabo. facies? [f. 99 b]

‘faciam. fideiubes ? fideiubeo.’ ‘et omnis talis stipulatio aut
 ‘fit pure aut in diem aut sub condicione. pure, ut si dicatur,
 ‘tantam pecuniam dare spondes ? sine aliqua adiectione
 ‘diei vel condicionis, pecunia illa statim peti poterit. sed si
 ‘dies adiciatur, quo solvi debeat, statim debetur, sed peti
 ‘non poterit ante diem, nec etiam eo die, quia totus is dies
 ‘relinquitur arbitrio solventis, nec certum non erit ¹ eo die
 ‘solutum non esse, priusquam dies praeterierit.’ nec eodem
 modo recte ² petet quis, si quis hoc anno vel mense dare
 stipulatus est, nisi omnibus partibus praeteritis anni vel
 mensis. {Eodem modo, si quis hominem vel fundum
 stipulatus fuerit, non recte petet antequam tantum spatium
 praeterierit, quod tradi possit.³} [§ 3.] Item ‘aliquando
 ‘sub condicione fit stipulatio, ut si dicatur: *Si Titius consul*
 ‘*factus fuerit, tantam pecuniam dare spondes ?* et notan-
 ‘dum quod in condicionali stipulatione tantum spes conci-
 ‘pitur, et condiciones, quae ad praeteritum vel ad praesens
 ‘tempus referuntur, aut ⁴ statim infirmant obligationem,
 ‘aut omnino non differunt, ut si dicatur: *Si talis vixerit*, vel
 ‘*consul factus fuerit, dare spondes ?* nam si ita non fuerit,
 ‘nihil valet: si autem res ita se habeant, statim valet, quia ea
 ‘quae per rerum naturam certa sunt, statim non morantur ⁵
 ‘obligationem, quamvis apud nos incerta fuerint.’

[f. 100] [III. 2. § 4.] ‘Facta autem in stipulationibus dedu-
 ‘cuntur, ut si facta fuerit stipulatio aliquid fieri vel non
 ‘fieri, quo casu optimum erit poenam adicere, ne quantitas
 ‘stipulationis sit in incerto, vel necesse sit actori probare
 ‘quid eius intersit. et tali modo adiciatur poena: Et si hoc
 ‘factum non ⁶ erit, tunc nomine poenae tantum dare
 ‘spondes ?’ ⁷ [§ 5.] ‘Item loca deducuntur in stipulationem,

¹ *nec certum non erit* Dig. Corb. Reg.; *cum certum non erit* Ed. Cr.;
nec vero certum erit Vulg.

² *rite* Cr.

³ Omit Dig.; but in text of Corb. Ed. Cr. Reg. Gl.: perhaps an early
 additio.

⁴ *ut* Dig.

⁵ *moriantur* Dig. Cr. Gl.; *moriantur* with *i* expuncted Corb. Reg. Ed.
 Sh.; *viciant* Vulg.

⁶ Insert *fuerit vel non* Vulg.; omit Dig. Ed. Cr. Reg.

⁷ Here in the Vulgate occurs the passage *Item si de una re . . . vel*
furtum vel huiusmodi, which we give at the beginning of our next section.

‘ut si dicas existens Exoniae¹: *Hodie Londoniae dare*
‘*spondes?* talis stipulatio erit inutilis, nisi tempus adicia-
‘tur quo fieri possit id quod deducitur in stipulationem,
‘quia omnino erit impossibile,’ ‘ac si quis rem promitteret
‘quae in rerum natura non esset, vel esse non posset, vel
‘si rem sacram vel publicam quae non est in alicuius
‘bonis.’

NOTES.

Bracton now turns to Inst. 3. 15, but keeps his eye on Azo's commentary. This title of the Institutes begins thus:—‘Verbis obligatio contrahitur ex interrogatione et responsu, cum quid dari fieri nobis stipulamur.’ Azo refers to his treatment of this matter in his Summa of the Code (8. 38), where he says:—‘Stipulatio est verborum conceptio quibus is qui interrogatur daturum facturumve se id quod interrogatus est spondet.’ This definition he borrows from Dig. 45. 1. 5. § 1. Hence Bracton's ‘verborum conceptio.’ Returning to the Institutes Bracton omits two phrases, one of which names the actions which arise from stipulations, and the other indulges in an etymological speculation about the derivation of the term *stipulatio*, and he takes up the text where it is describing the solemn words by which in time past (*olim*) stipulations were made. From among these he omits ‘Spondes? Spondeo.’ He then omits the reference to the constitution of Leo which abolished the requirement of solemn set phrases.

He next mentions the various kinds of stipulation (*aut pure aut in diem aut sub conditione fit*). He repeats the rule that the whole of the day fixed for a payment is open to the creditor, and interjects the remark that the same rule holds good if a year or a month is fixed. He then reproduces nearly all that remains of tit. 15, but attempts to abbreviate it and changes the order of some sentences.

As to the conditional stipulation, his text would have been clearer, had he said at the outset, ‘Sub condicione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit aut non fuerit, stipulatio committatur.’ Bracton substitutes, ‘Et notandum quod in condicionali stipulatione tantum spes concipitur,’ for ‘Ex condicionali stipulatione tantum spes est debitum iri, eamque ipsam spem transmittimus, si, priusquam condicio existat, mors nobis contigerit.’ Perhaps he does not understand this passage; perhaps he has many doubts as to whether the benefit of a conditional promise passes to the promisee's heir. He then skips over a sentence devoted to cases in which the promise is one which can only be performed at a certain place, *e.g.* at Carthage, and turns to the cases of ‘subjective uncertainty.’

¹ *Exon*’ Dig. Reg.; *Oxon*’ Corb. Cr. Sh. Chert. St. Ha. Gray. Vulg.; *Ebor*’ Ed.

His 'Si talis vixerit vel consul factus fuerit' represents the 'Si Titius consul fuit' and 'Si Maevius vivit' of the Institutes. In these cases there is no conditional obligation; either there is no obligation at all or the debt is already due. The phrase in which he tells us this is a good instance of the gradual corruption of his text. The Institutes say, 'quae enim per rerum naturam certa sunt non morantur obligationem, licet apud nos incerta sint.' The *morantur*, however, is corrupted into *morianur*, and then, this being unintelligible, some bold emendator suggests *viciant*, which appears in the Vulgate.

As to the use of penal clauses Braeton follows but abbreviates his model [Inst. 3. 15. § 7]. In the written contracts of his time such penal clauses were by no means unknown, and the advice given by Justinian seems to him sound, practical advice.

He then goes back to § 5 which he has omitted. The Institutes speak thus: 'Loca enim inseri stipulationi solent, veluti, "Carthagine dare spondes?" quae stipulatio licet pure fieri videatur, tamen re ipsa habet tempus iniectum quo promissor utatur ad penam Carthagino dandam. et ideo si quis ita Romae stipuletur *Hodie Carthagine dare spondes?* inutilis erit stipulatio, eum impossibilis sit repromissio.' Whether Braeton altogether understood this text seems doubtful. Having said that a promise made at Exeter (or Oxford) and to be performed on the same day at London must be void for impossibility, he gives other instances of impossible promises, taking them from Inst. 3. 19. §§ 1 2.

[f. 100] [III. 2. § 5 cont.] {'Item si de una re senserit stipulator 'et de alia promissor, non valet, non magis quam si ad interrogatum non esset responsum.' Item non valet, si quis ita stipuletur quod quis homicidium perpetret vel furtum vel huiusmodi.¹} Item si quis stipulatus fuerit qui alium daturum vel facturum promiserit quam eum qui in potestate sua extiterit, 'vel si quis ad ea quae interrogatus fuerit non responderit, nec secundum quod interrogatus fuerit, ut si 'quis decem aureos dari stipuletur et alius quinque promittat, 'vel si unus pure et alius sub condicione, stipulatio non 'valebit.' {'Item erit inutilis si quis ita stipulatus fuerit: 'Si navis venerit de Asia hodie dare spondes? quia praepostere concepta est.' tamen, licet praepostera fuerit, non erit reicienda.²} 'Item non valebit si impossibilis adiecta

¹ This passage, not in Dig., is found in other MSS. in various places. It has all the appearance of an early marginal *additio*.

² Not in Digb. and sometimes found at a lower point.

‘fuerit condicio cui natura¹ impedimento fuerit quod existat,
 ‘veluti si dicat : *Si digito caelum tetigero, dare spondes ?* si
 ‘autem sic : *Si caelum digito non tetigero, tunc valet, quia*
 ‘pure facta est et statim peti poterit.’

NOTES.

Having been led away into a discussion of the invalidity of certain promises, Bracton skips over Inst. 3. tits. 16. 17. 18 and fastens on tit. 19 (*de inutilibus stipulationibus*). That title deals in the first place with a promise to give something that is not *in rerum natura*, e.g. the slave Stichus who is dead, or a hippocentaur; then it deals with a promise to give *rem sacram aut religiosam, vel liberum hominem*. This is represented in Bracton's text, but he omits a discussion as to the possibility of the *res publica* falling into private hands and the free man becoming a slave. Next Justinian speaks of a promise that some one, other than the promisor, shall do a certain thing, and then of a promise made by *A* to *B* that *A* will do something for one *C* who is not *B*'s paterfamilias. Bracton in one brief and obscure clause seems to slur over these two cases. Whenever there is talk of *patria potestas* he begins to blunder. Also we may doubt whether the doctrine that one cannot stipulate so as to give a third person a contractual right would have seemed natural to him. Learned writers have said that Germanic law does not easily adopt this doctrine, and that here lies the possibility of notes and bills drawn to order or to bearer. Bracton may already have seen such things; they were already current among the Lombard merchants. At any rate he here cuts short a long passage (Inst. 3. 19. §§ 3. 4) by a single phrase that is not very luminous. Next Justinian (§ 5) touches a case in which the answer does not meet the question; Bracton follows him or endeavours to do so. The passage about the ship that comes from Asia—above it is printed within brackets—appears to be one of his marginalia. It is intended to represent Inst. 3. 19. § 14. A little higher up in his margin Bracton seems to have introduced the sentences which deal (1) with the case in which the stipulator is thinking of one thing and the promisor is thinking of another, and (2) with the promise to commit a crime. These sentences answer to Inst. 3. 19. §§ 23. 24. Bracton then notices the case of an impossible condition, giving the substance of § 11. He has omitted a good many instances which Justinian gives of an invalid *stipulatio*. Of the deaf and the dumb and the lunatic he will speak below. Other passages he probably rejects as too refined or as inappropriate; notably the following (§ 6): ‘Item inutilis est stipulatio, si ab eo stipuleris, qui iuri tuo subiectus est, vel si is a te sti-

¹ Insert *in* Vulg.

‘puletur. sed servus quidem non solum domino suo obligari non potest, sed ne alii quidem ulli: filii vero familias aliis obligari possunt.’ Having exhausted, at least for a while, the long tit. 19, Braeton now turns back to tit. 18 (*de divisione stipulationum*).

[f. 100]

[III. 2. § 6.] ‘Iudicialis etiam¹ esse poterit stipulatio’ ‘vel conventionalis.’ iudicialis, quae iussu iudicis fit vel praetoris. ‘conventionalis, quae ex conventionē utriusque partis concipitur, nec iussu iudicis vel praetoris, et quarum totidem sunt genera quot paene² rerum contrahendarum.’ de quibus omnibus omnino curia regis se non intromittit, nisi aliquando de gratia.

NOTES.

Braeton recurs to tit. 18 (*de divisione stipulationum*). He simplifies Justinian’s division, which is, (1) *iudiciales*, (2) *praetoriae*, (3) *conventionales*, (4) *communes, tam praetoriae quam iudiciales*. He omits the examples of judicial and praetorian, and the account of ‘common,’ stipulations.

When writing of judicial stipulations he is perhaps thinking of recognisances, for, though these contracts are recorded in writing, they are not sealed by the parties; they are already becoming common. Again, when the essoiner pledges his faith for the appearance of the essoiner, this may be regarded as a judicial stipulation. It would be needless to say that the last clause of this passage is not from the Institutes. The king’s court will not trouble itself about ‘conventional stipulations,’ that is, about contracts made outside the court and by mere word of mouth. Braeton, who has been looking at Glanvill lib. x. cap. 8, does not deny that the extrajudicial ‘stipulation’ (parol agreement) is binding. The king’s court will sometimes enforce it as a matter of grace, but is not bound to do so. This admission, however, gives a certain unreality to all that Braeton says of ‘stipulations’; it is pious opinion rather than practicable law.

[f. 100]

[III. 2. § 7.] ‘Si cum res plures in stipulationem deducantur, promissor simpliciter respondeat sic dare spondeo, propter omnes tenetur. et si unam rem tantum ex

¹ autem Vulg.

² poenae (!) Vu’g. No MS. of Braeton will have any diphthongs. The Inst. have *sunt genera quot paene dixerim rerum contrahendarum*.

‘ pluribus se daturum promiserit, vel quasdam, obligatio in
 ‘ iis contrahitur pro quibus respondit.¹ ex pluribus enim
 ‘ stipulationibus una vel quaedam videntur esse perfectae,
 ‘ et cum plures sint res, ad singulas responderi debere.’²

NOTES.

This gives the substance of Inst. 3. 19. § 18, with a few verbal changes. The original passage runs thus:—Quotiens plures res una stipulatione comprehenduntur, ‘ si quidem promissor simpliciter re-
 ‘ spondeat *dare spondeo*, propter omnes tenetur: si vero unam ex his
 ‘ vel quasdam daturum se spoponderit, obligatio in his pro quibus
 ‘ spoponderit contrahitur. ex pluribus enim stipulationibus una vel
 ‘ quaedam videntur esse perfectae: singulas enim res stipulari et ad
 ‘ singulas respondere debemus.’

[III. 2. § 8.] In fine autem videndum quis non possit [f. 100]
 stipulari nec promittere, ut sciri possit³ quis possit stipulari.
 ‘ et sciendum quod mutus neque stipulari potest neque
 ‘ promittere, cum loqui non possit, nec verba stipulationi
 ‘ congruentia proferre. quod quidem in surdo receptum⁴
 ‘ est, quia is qui stipulatur verba promittentis et is qui
 ‘ promittit verba stipulantis audire oportet,’ nisi sit qui
 ‘ dicat quod hoc facere possit⁵ per nutus vel per scripturam.
 ‘ nec dicitur hoc de eo qui tardius audit, sed de eo qui
 ‘ omnino non⁶ exaudit.’ Et quod per scripturam fieri
 ‘ possit stipulatio et obligatio videtur, quia si scriptum
 ‘ fuerit in instrumento aliquem promisisse, perinde habetur
 ‘ ac si interrogatione praecedente responsum sit.’ ‘ Furiosus
 ‘ autem stipulari non potest nec aliquod negotium gerere,⁷
 ‘ quia non intelligit quid agit.’ Eodem modo nec ‘ infans
 ‘ vel qui infanti proximus est, et qui multum a furioso non
 ‘ distat,’ nisi hoc fiat ad commodum suum et cum tutoris
 auctoritate.

¹ *responderit* Vulg.

² *Sic* Dig. Reg.; *respondere debere* Corb.; *respondere debet* Vulg.; *respondere debemus* Inst.

³ *poterit* Vulg. ⁴ *exceptum* Corb. Ed. Cr. Reg. Vulg. making nonsense.

⁵ *possunt* Vulg.

⁶ *non omnino* Vulg.

⁷ *Sic* Dig. Ed. Cr. Reg. Inst.; *agere* Vulg.

NOTES.

Once more Bracton turns to Inst. 3. 19, and he here means to give the substance of §§ 7-10. As regards the dumb and the deaf he closely follows his model. It then occurs to him that the dumb and the deaf may be able to stipulate and to promise by writing. For his suggestion that a *stipulatio* can be made by written instrument, he has of course no sufficient warrant in his Roman text, but he cannot suppress the medieval notion that a written document must be at least as binding as an oral question and answer, and the words 'si scriptum fuerit' '... responsum sit,' which he borrows from Inst. 3. 19. § 17, are among the passages which show that in Justinian's day written instruments professing to record stipulations were for practical purposes taking the place of the old oral conversation. The last sentence is an equivalent for two sections which deal with the contractual capacity of minors. Bracton ignores several distinctions, and rejects the term *pupillus*. It must be very doubtful whether he uses the word *infans* in its Roman sense to denote a child under seven years of age. Probably for him all persons who are not of full age are infants (*enfants*), and he would have no answer if he were asked to define the *infanti proximus*; even modern civilians have not found this an easy task. (See Moyle, *Institutes*, vol. i. p. 417.)

[f. 100] [III. 2. § 9.] 'Inventae autem sunt huiusmodi stipulationes et obligationes ad¹ hoc quod unusquisque² sibi 'acquirat quod sua interest' si contra ea agatur quae in stipulationem deducuntur. et si res in stipulatione deducta 'alii detur,' nihilominus 'intererit stipulatoris,' quia ille qui promisit tenebitur ad interesse vel ad poenam si poena fuerit in stipulatione deducta.

[f. 100 b]

NOTES.

This is a curious fragment taken from Inst. 3. 19. § 19, and marvellously perverted. Justinian is going over the cases in which a *stipulatio* is invalid. 'Alteri stipulari, ut supra dictum est, nemo potest: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum si alii detur, nihil interest stipulatoris.' Thus Bracton begins by giving the reason for a certain rule without stating that rule: namely, 'Alteri stipulari

¹ *et*, not *ad*, Vulg.

² Insert *habeat et* Vulg.

'nemo potest.' Does he accept the rule? That, to say the least, is very doubtful. Justinian, having stated the rule, gives a reason for it. The object of enforcing stipulations is that a man may get *quod sua interest*. But, he urges, if *A* stipulates that *B* shall do something for *C*'s benefit, then (as a general rule) *A* has no legal interest in the enforcement of *B*'s promise. In attempting to enforce it, *A* will not be seeking *quod sua interest*. Then he adds that practically what *A* here wishes to do can be done by a penal stipulation. Instead of saying, 'Will you promise to give this thing to *C*?' *A* can say 'Will you promise to pay me so much money if you do not give this thing to *C*?' A further explanation is then given:—*A* can stipulate that something shall be given to *C*, if thereby *A* himself will obtain some benefit: 'Sed et si quis stipuletur alii, cum eius interesset, placuit stipulationem valere.' This proposition is then illustrated by examples.

Now Bracton, in the first place, leaves out the main rule. He says that the object of enforcing stipulations is that men may acquire that in which they have an interest. He adds, 'And even if the thing mentioned in the stipulation is to be given to another, still the stipulator has an interest in the stipulation, for the promisor is bound to pay interest or a penalty, if one has been established by the stipulation.' One word as to this translation. When Bracton says of the promisor 'tenebitur ad interesse,' he must, we take it, mean that the promisor is bound to pay interest; but what in our own day and our own words would look like a stupid pun is nothing of the kind in Bracton's day. Interest is paid to a contractor because he has a legal interest in the fulfilment of a contract; to pay interest to one who has no interest would be to pay, not interest, but usury. In short, when we read this passage we must call to mind the history of our word *interest*. At any rate, it seems probable that Bracton, though not fully aware of what he is doing, rejects the rule 'Alteri stipulari nemo potest.' If *A* has stipulated that *B* shall confer some benefit upon *C*, then *A* will have an interest in enforcing *B*'s promise. We may perhaps supply a link in the reasoning, an English link. The fact that a man has been at pains to exact a promise shows that he has 'an interest' in the fulfilment of that promise.

[III. 2. § 9 cont.] Per scripturam vero obligatur quis, [f. 100 b]
 'ut si quis scripserit¹ se debere, sive pecunia numerata
 fuerit, sive non,' obligatur ex scriptura, 'nec habebit
 exceptionem pecunie non numeratae' contra scripturam,
 quia scripsit se debere. 'et non solum obligatur quis
 per verba, sed per scripturam et per litteras. non ut
 litterae quidem ipsae, vel figura litterarum obliget, sed

¹ Insert *alicui* Vulg.

‘ oratio significativa quam exprimunt litterae. sed utrum-
 ‘ que cooperatur ad obligationem, oratio significativa simul
 ‘ cum littera.’

NOTES.

Curiously enough, Bracton leaps over tit. 20 *de fideiussoribus*, though suretyship was common enough in the England of his time. He has dealt with ‘real’ and with ‘verbal’ contracts. He now has to produce some equivalent for tit. 21 *de litterarum obligatione*. That title, after a brief reference to certain obsolete ‘literal’ contracts, proceeds thus:—‘Planc si quis debere se scripserit quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest: hoc enim saepissime constitutum est.’ Bracton fastens on these words, distorts them, and under cover of the passage in which Justinian has tried to set up something which will look sufficiently like a ‘literal’ contract to fill a place in the traditional scheme, he introduces us to the great formal contract, the sealed contract, of English law. If in writing (at this time there is no need to mention the seal: it can be taken for granted) a man has confessed that he owes money, he owes it. So we leave out ‘post multum temporis.’ The written instrument is not mere evidence of a contract; it can already be regarded as the contract itself.

The last two clauses of this passage Bracton obtains from Azo, Inst. 3. 21, who says:—‘Non solum per verba, ut dictum est, contrahitur obligatio, sed etiam litteris. quod quidam intelligunt ut litterae quidem ipsae vel figura litterarum nullo modo obliget, sed obligat oratio quam exprimunt litterae, ut ff. *de act. et obl.* l. non figura [D. 44. 7. 38]: sed ego intellego utrumque cooperari ad obligationem, id est significativam orationem et ipsas litteras, ut etiam ex ipsis litteris nascatur obligatio, et subaudio ibi *sola*: et est ratio, quia secundum eos eadem ratione verbis non obligaretur vel vocabuli oratione sed intellectuali. ut enim est scriptura ita et vocabulis oratio, et tamen ubique dicitur verbis quem obligari.’ The question is a somewhat scholastic one. Is it true to say that we are bound by the letters, the written characters? No, say some, citing a well-known dictum from Paulus, ‘Non figura litterarum sed oratione, quam exprimunt litterae, obligamur;’ what binds is the *oratio significativa* that is committed to writing. Azo thinks otherwise. He reads the word *sola* into this dictum. It is not the written letters by themselves that bind us; there is a cooperation between the letters and the meaning. My opponents, he argues, ought by parity of reasoning to reject such a term as ‘obligor verbis.’ If the binding force is not to be attributed to the written *litterae* in the one case, it ought not to be attributed to the spoken *verba* in the other case. Bracton gives Azo’s doctrine without noticing the controversy which evoked it.

[III. 2. § 9 cont.] ‘Contrahitur etiam obligatio non [f. 100 b] ‘solum scripto et verbis sed¹ consensu, sicut in ‘contractibus bonae fidei, ‘ut in emptionibus venditionibus, locationibus conductionibus, societatibus et mandatis. et ‘ideo dicuntur obligationes huiusmodi contrahi ex consensu, quia nec scriptura nec praesentia semper est necessaria.’ ‘Et notandum quod in his contractibus nominatis² ‘uterque obligatur alteri, sed³ in mutuo vel in litterarum ‘obligatione et aliis casibus⁴ pluribus sicut in commodato ‘et deposito et aliis huiusmodi [unus tantum obligatur ‘alteri⁵]. et si non a principio tamen postea potest ‘uterque incipere alteri obligari vel ratione expensarum et ‘huiusmodi.’

NOTES.

This represents Inst. 3. 23, but is derived more immediately from Azo's commentary on that title. Azo, however, does not say that the consensual contracts are contracts *bonae fidei*. He says:—‘Non ‘solum rebus et verbis et litteris contrahuntur obligationes sed etiam ‘consensibus, ut in venditionibus, locationibus conductionibus, ‘societatibus et mandatis.’ Azo proceeds to expand the Institutional text by citations. ‘These obligations are said to be contracted by ‘consent, for writing is not necessary, nor an actual meeting (*praesentia*) of the parties such as is required for a *stipulatio*, nor is it ‘necessary that something should be given as is the case where there ‘is a contract *re*.’ Why does not Bracton follow his two leaders and contrast the consensual with the ‘real’ contract? Because he is bound by the sacred text to say that the contract of sale is consensual. He has not the courage to say that it is ‘real,’ and yet, as he has betrayed elsewhere (f. 61 b), English practice demands either writing or some transfer of the thing, if there is to be a contract of sale. So he shuts his eyes and passes by an awkward place.

The title of the Institutes ends thus:—‘Item in his contractibus ‘alter alteri obligatur in id quod alterum alteri ex bono et aequo ‘praestare oportet, cum alioquin in verborum obligationibus alius ‘stipuletur, alius promittat.’ Azo expands this into:—‘In istis contractibus uterque obligatur alteri, sed in mutuo, vel in stipulatione, vel ‘litterarum obligatione, vel aliis plerisque, unus tantum obligatur alteri. ‘et haec omnia dicit series huius tituli. *plerisque* ideo dixi, quia in ‘commodato et in deposito, et si non a principio, tamen postea potest

¹ Ins. et Vulg.

² Sic Dig. Ed. Cr. Reg. Gl. Sh. Vulg.

³ Not *sed* but *s* [= *scilicet*] Vulg.

⁴ *causis* Digb.

⁵ No MS. authority has been found for these words.

'incipere uterque alteri teneri ratione expensarum vel similium.' Bracton has endeavoured to give the substance of this passage. The four words that are printed in brackets (*unus tantum obligatur alteri*) have fallen out of the Vulgate text and this has made nonsense of it, nor have we yet found them in any manuscript; but their restoration is imperatively required, unless we are to suppose that our author left a sentence unfinished. Azo's point is that there are cases, such as *commodatum* and *depositum*, in which, though at the moment at which the contract is made one party comes under no obligation to the other, he may at some future time become bound by that contract to do something, *e.g.* to pay money to the other party.

Here there follow in the Institutes four titles devoted to the four consensual contracts (tit. 23-26). Bracton gives no equivalent. He has before now had his say about sale and hiring (ff. 61 b-62 b); as to *societas* and *mandatum*, they are above his head. So we pass to obligations *quasi ex contractu*.

[f. 100 b]

[III. 2. § 10.] Dictum est¹ de obligationibus quae nascuntur ex contractu. ²nunc autem dicendum est de obligationibus quae nascuntur quasi ex contractu.² et sciendum quod quasi ex contractu nascuntur actiones, sicut negotiorum gestorum, tutelae, communi dividundo, familiae erciscundae, actio ex testamento, condictio indebiti, et huiusmodi.

NOTES.

This is a brief and meagre summary of Inst. 3. 27, where the nature of the various obligations that are here mentioned is pretty fully explained. Bracton hurries past this impracticable learning. For some of the obligations here mentioned he would find it difficult to produce an English equivalent, while he feels, and is right in feeling, that this is not the place in which to discuss partition actions or the actions which lie for a ward against a guardian.

[f. 100 b]

[III. 2. § 11.] De traditione fiat ut supra in titulo de donationibus. Iunctura, ut si plura pacta de eadem re deducantur in stipulationem. possunt plura pacta in stipulationem deduci sicut plures res, et si incontinenti

¹ Insert *supra* Vulg.

²⁻² Omit this clause Digb. Corb. Ed. Cr. Reg. Gl. Sh.

adiciantur¹ in initio contractus, insunt contractibus et legem dant eisdem et contractus informant. si autem ex intervallo non sic:² ut si primo pactum³ intervenit ne peteret, et postea de eadem re ut peteret, primum pactum per posterius eliditur, non tamen ipso iure, sed ope⁴ exceptionis.

NOTES.

This passage would have come better before that which immediately precedes it, and some distortion of the text may be suspected, for we here go back from quasi contract to contract. We have seen above how Bracton holds that there are six possible vestments for a pact. To the classical four, 're, verbis, scripto, consensu,' he adds 'traditione, iunctura.' Following the Institutes, he has dealt with the first four vestments. He ought to say a word of the other two before he leaves contract for quasi contract. 'As to *traditio* [delivery] see 'what I have said above in the chapter on donations.' The commonest medieval contract is the feoffment, or, to use a yet more general term, the gift or donation—a term currently used though the feoffee may pay money for the 'gift' and will come under onerous obligations. We can well understand Bracton's difficulty in finding a place for this in the Roman scheme. It calls itself a *donatio*; sometimes it is very like *emptio venditio*; usually it is very like *locatio conductio*; one does not like to say that it is made *re*, and yet most indubitably its 'vestment' is a livery (*traditio*) of seisin. So we are glad to find *traditio* in the Romanist's list of vestments and are not careful to explain its relation to *res*.

At the beginning of the next sentence *iunctura* is an ablative. We must supply such words as 'Contrahitur etiam obligatio.' Another vestment for the pact is 'jointure.' In the memorial lines which we have cited above (p. 143) this word is used to indicate the *pacta adiecta*, which, in Azo's picturesque phrase, nestle among the furs of well-dressed contracts. Bracton then strives to follow Azo (*Summa Codicis*, 2. 3) into a doctrine about *pacta de petendo* and *pacta de non petendo*. Azo says: 'pactum de non petendo naturalem tollit obligationem; pactum autem de petendo non tollit ipso iure pactum de non petendo, quia naturalem obligationem extinctam non resuscitat, et obstaculum quod opponebatur civili ne sortiretur effectum reicit remedio replicationis.' Of all this Bracton can make little.

¹ Insert *etiam* Vulg.

² *non sic* Cr. Reg.; *non sit* Dig. Cr. Vulg.

³ *ut si post factum* Digb. The reading here adopted is that of Ed. Reg.

⁴ *ope* Digb. Corb. Ed. Cr. Reg.; *opere* Vulg.

[f. 100 b]

[III. 2. § 12.] ‘Videndum etiam¹ per quas personas ‘adquiritur obligatio. [et per nosmet ipsos et filios ‘nostros, et per liberos homines servientes nostros ex ‘duabus causis, scilicet, ex operibus suis et re nostra, ‘adquiritur obligatio.’] et sciendum quod per procuratores ‘et per liberos quos sub potestate nostra habemus. item ‘per servos proprios vel communes vel in quibus usumfructum habemus, vel alios quos bona fide possidemus, dum ‘tamen nomine nostro fuerint stipulati.’

NOTES.

The passage printed in brackets is not in the Digby MS. It is found at various points in the text of other MSS. and has all the appearance of a marginal *addicio*. Apparently Bracton has made two different efforts to give in a few words the substance of Inst. 3. 28; but he omits what he cannot understand or regards as un-English. Thus, Justinian has to explain that the profit arising from a contract made by a *filiusfamilias* does not belong altogether to the father, and Azo writes learnedly of the various kinds of *peculium*. Bracton ignores all this, and would have done better had he said nothing about children under paternal power. For English law the question is already becoming one of agency. Bracton therefore inserts *per procuratores*, which neither Justinian nor Azo will warrant. Then, again, the ‘per liberos homines servientes nostros’ is no true equivalent for the ‘per liberos homines. . . . quos bona fide possidetis’ of the original. But the whole doctrine is slurred over.

[f. 100 b]

[III. 2. 13.] ‘Videndum etiam quibus modis tollitur obligatio.’ et sciendum quod tollitur quandoque ‘per exceptionem’ multipliciter, ut si quis petat et alius doceat se solvisse. ‘item ratione pacti,’ ut si prius convenit ut peteret, postea ne peteret. ‘item per exceptionem doli vel metus,’ ut si exorta fuerit obligatio per dolum vel per metum. ‘item per exceptionem rei iudicatae,’ ut si per iudicium recessum sit ab obligatione. ‘item’ per exceptionem ‘iurisiurandi,’ cum delatum fuerit iusiurandum vel relatum et postea iuratum. Item per exceptionem prae-

¹ Insert est Vulg.

scriptionis propter defectum probationis, quia sicut tempus est modus inducendae obligationis, ita et tollendae per dissimulationem et negligentiam, et per consequens actionis quae sub certis temporibus limitatur. currit enim tempus contra desides et sui iuris contemptores. item tollitur [f. 101] morte alterius contrahentium, vel utriusque, maxime si fuerit poenalis et ¹ simplex. si autem duplex,² poenalis et rei persecutoria, in hoc quod poenalis est tollitur, et non extenditur contra heredes, nec datur heredibus, quia poena suos tenet auctores, et extinguitur cum persona. ‘Item tollitur cum sic sit extincta, quod nullae remaneant eius reliquiae, sicut per veram solutionem, quia soluto eo quod debetur, omnis tollitur obligatio,’ {‘sive ipse solvat qui debeat, sive alius pro eo, sive debitore sciente, sive ignorante, et eo etiam invito. Item si reus solverit, fideiussor liberatur, et e contrario.’³} ‘Item per acceptilationem, quae dicitur imaginaria solutio,’ ut si dicatur: *Omne quod tibi debui ex quacumque causa habesne acceptum?* et respondeatur vel scribatur: *Habeo, acceptumque fero.* {Et in partem debiti poterit acceptilatio fieri, sicut in toto. et possunt omnes res, quae aliqua ratione in stipulatione deducuntur, tolli per acceptilationem. et eodem modo quo tolluntur per acceptilationem obligationes, ita poterunt renovari et deduci in aliam obligationem plures et unam, ut si pro pluribus debitis, causis, et obligationibus promittatur certa summa pecuniae.⁴} ‘Item per novationem, ut si transfusa sit obligatio de una persona in aliam, quae in se susceperit obligationem.’ {Interventu enim novae personae nova nascitur obligatio, et prima tollitur, sicut de constituta, ut si quis in se susceperit alterius obligationem. item si ab una persona transfusa sit in aliam quae obligari non possit, amittitur, ut si in personam minoris a persona maioris. item in novatione intervenire poterit fideiussor et poena. item sub conditione, ut si secundus bene solverit, alioquin durat prima.⁵} ‘Item per confusionem,’ ut si

¹ et Dig. Ed.; vcl Corb. Cr. Reg. Vulg.

² Insert *scilicet* Vulg.

³ This phrase is not in Dig. It may be an *additio*.

⁴ This passage is not in Dig. Gl.

⁵ Not in Dig.

massa confusa fuerit cum alia ita quod non appareat. 'Item per interitum rei et speciei.' 'In' solutione tamen 'notandum quod praedicta vera sunt si corporale erat quod deductum fuit in obligationem : si autem incorporale, sicut 'servitus vel aliud ius quod est incorporale, non poterit fieri 'inde solutio, cum res incorporalis traditionem non patiat. 'videtur tamen quasi traditionem fieri per quotidianam 'patientiam' et per usum. Et in summa notandum quod eisdem modis dissolvitur obligatio, quae nascitur ex contractu vel quasi, quibus contrahitur. re, ut si res petenti restituatur. verbis, ut si fiat in contrarium et contrariis verbis. scripto, ut si cum scripserim² me debere, scribat creditor se accepisse. consensu, ut si communiter consensum fuerit ex utraque parte, recedatur a contractu per communem dissensum utriusque et non alterius tantum. traditione, ut si res tradita retradatur. iunctura, ut si fiat contrarium.³

NOTES.

Braeton has now arrived at Inst. 3. 29. This paragraph, however, is taken, not from that title as it stands in Justinian's book, but from Azo's commentary. Justinian there deals only with the modes in which an obligation can be discharged 'ipso iure,' and does not speak of the modes in which it can be deprived of the whole or part of its efficacy 'ope exceptionis.' Azo, on the other hand, begins thus : 'Duo sunt modi in genere quibus tollitur obligatio, id est, per exceptionem et ipso iure. quae exceptio competit ex pluribus causis ut ratione pacti, item doli vel metus, item rei iudicatae et iurisiurandi, ut ff. *de excep.* l. iii. et l. *exceptiones* [D. 44. 1. 3 et 7].' Braeton follows him with some amplifications which can be obtained from Inst. 4. 13. Azo proceeds : 'Item ratione temporis ut xxx. annorum vel xl. ut in hypothecaria. quandoque tamen ipsa tollitur celeriori tempore, ut notavi in Summa C. *de praescript.* xl. an. [C. 7. 39]. Item et in fundis patrimonialibus locum habet exceptio xl. annorum, ut C. *de fundis patri.* l. ult. [C. 11. 62. 14].' Braeton provides a substitute for this in more general phrases about the limitation of actions, and he then, without warrant in the books that are before him, introduces

¹ Item, not In, Vulg.

² si conscripserim Vulg.

³ There are many differences between the MSS. as to the order of the preceding sentences. They seem to show that the sentences here printed in brackets were marginal.

the death of one of two parties between whom the obligation has been contracted. Of this he will speak more at length hereafter. Meanwhile Azo has begun to argue that he is right in introducing his remarks about *exceptiones* at a place where Justinian says nothing about them: 'Nec sunt haec extra rem. quia hic generaliter tractat' [Justinianus] de omni modo quo tollitur obligatio.' He proceeds to explain that though the 'obligatio tollitur per exceptionem,' nevertheless some relics (*reliquiae*) of it may remain; for example, the *civilis obligatio* may remain, though, owing to the existence of the *exceptio*, it is 'de facto inefficax.' Then, by way of contrast (and here Bracton begins to follow him once more): 'Ipso vero iure tollitur obligatio' cum omnino est extincta, nec ullae remanent eius reliquiae, puta per solutionem et per acceptilationem et per novationem et per confusionem et per interitum speciei et per alios modos de quibus breviter notare potes ut notavi in Summa C. de sol. et de novat. [C. 8. tit. 42 et tit. 41].'

Azo then turns to the discussion of a few points of detail. As to Bracton, we may perhaps infer from the Digby MS. that at first he intended to give, like Azo, little more than a bare list of the modes in which obligations are 'ipso iure' discharged: namely, *olutio*, *acceptilatio*, and so forth; but afterwards reflected that those terms required some explanation, and sought that explanation in the Institutes 3. 29, or elsewhere. His (probably marginal) statement about a partial acceptilation does not come from this title of the Institutes, nor from Azo's commentary thereon, and though it may be ultimately traced to passages in the Digest (e.g. D. 46. 4. 9), the immediate source whence he took it has not been found. (We refer to the passage 'Et in partem debiti . . . acceptilationem.') All reference to the Aquilian stipulation is omitted as unpractical. The account of novation is cut short. He then mentions *confusio* and *interitus speciei*, which Azo also has mentioned. The words 'item' per confusionem ut si massa confusa fuerit cum alia ita quod non appareat' seem to show that he utterly misunderstood the meaning which Azo attached to the term *confusio* in the present context. Azo is thinking of cases in which the creditor becomes heir to the debtor, or the debtor heir to the creditor. It is painfully evident that in Bracton's mind the sort of *confusio* in question is the 'confusion' of one mass of matter (e.g. of wine or oil) with another. This is a bad mistake. As to the *interitus speciei*, Azo, in his Summa of the Code (8. 42) explains the matter thus: 'Item [tollitur obligatio] per interitum speciei quae erat in obligatione, nec praecesserit mora, nec debitor occidit,'¹ ut ff. e. l. verborum et de ver. obl. l. si ex legati et l. nemo rem suam § 1 [D. 46. 3. 107; 45. 1. 23; 45. 1. 82].'

Bracton's next sentence about corporeal and incorporeal things is from Azo (Inst. 3. 29): 'In solutione tamen illud nota, praedicta vera esse si corporale erat in obligatione. nam si erat incorporeale, puta

¹ The *res* in question being a slave.

'servitus, non potest in ea fieri solutio, cum res non recipiat traditionem, ut ff. *de adq. re. do.* l. *servus* § *incorporales* [D. 41. 1. 43. § 1]. quasi traditio videatur fieri per quotidianam patientiam.'

The concluding words of this section, 'Et in summa notandum . . . si fiat contrarium,' have not been traced to any source. If they are not Bracton's own, they probably come from the fount whence he borrowed his memorial lines about the six vestments for pacts. The general thought here expressed is Roman. Mr. Moyle (*Inst.* vol. i. p. 461) writes as follows: 'In connexion with the different classes of contracts, indeed, the jurists love the conceit that to the *causa* by which the *obligatio* is engendered in each of them respectively there should be a peculiarly corresponding mode of release: nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est. ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur (D. 50. 17. 35).' So Bracton, or the writer whom he is following, tries to find a mode of dissolution appropriate to each of the six classes of contracts.

[f. 101]

[III. 2. § 14.] Oriuntur etiam obligationes ex delicto vel quasi, ex maleficio vel quasi: delicta vero et maleficia ex dictis et factis praecedentibus, quae quidem distinguere debent quo animo fiant et qua voluntate. voluntas enim et propositum distinguunt maleficia, secundum quod inferius dicitur. Ex maleficiis autem procedunt crimina maiora vel minima,¹ sicut crimen laesae maiestatis, homicidia, furta, et rapinae et alia plura de quibus inferius dicitur. Item quasi ex maleficio transgressioniones sive praesumptiones, ut si iudex scienter male iudicaverit, et huiusmodi. Item ex maleficio vel delicto procedunt iniuriae et transgressiones. 'iniuria autem dici poterit omne illud quod non iure fit.' transgressio autem, cum modus et mensura non servatur. Et in his casibus considerandum erit quo animo, quave voluntate quid fiat in facto vel iudicio, ut perinde sciri possit quae sequatur actio et quae poena. 'tolle enim voluntatem et erit omnis actus indifferens, quia affectio tua nomen imponit operi tuo, et crimen non contrahitur, nisi nocendi voluntas intercedat: nec furtum committitur, nisi² ex affectu furandi.' In his autem delictis sive maleficiis

[f. 101 b]

¹ *minima* Dig. Corb. Reg.; *minora* Ed. Cr. Vulg.

² *nec* Dig.; *nisi* Corb. Cr. Ed. Reg. Vulg.

obligatur ille qui delinquit ei contra quem delinquit,¹ nec dissolvitur obligatio quoad poenam, nisi morte utriusque vel alterius. poena vero non transgreditur personam delinquentis, non enim debet poenam sentire qui in culpa non fuit, iuxta illud: *Poenā potest demī, culpa perennis erit.*

NOTES.

Following the order of the Institutes, Bracton must say a few words of the obligations which arise *ex maleficio vel quasi*. But neither Justinian's book (4. 1) nor Azo's commentary will provide him with quite what he wants, for they plunge at once into an account of particular delicts, beginning with *furtum*, while Bracton is here disposed to give us but a few generalities, for felonies, such as *furtum*, will require a very different treatment hereafter from that which they have received in the Institutes. He collects some generalities from various places. An ecclesiastic and a reformer, he lays stress on the psychical element in crimes and delicts; of this element English practice in time past will have taken too little account. For this purpose he goes back once more to Azo's commentary on Inst. 1. 1 (above p. 22), whence he takes the passage 'Tolle enim voluntatem . . . ex affectu furandi.' It will be noticed once more that his only example of liability *quasi ex maleficio* is that of the *iudex*; and here the *iudex* is only liable if he has knowingly given a false judgment. The definition of *iniuria* is from Inst. 4. 4 pr.; Bracton is not prepared to use that term in any but its most general and least useful sense. *Transgressio* of course is the equivalent for the French *trespas*; etymologically it suggests to Bracton the crossing of a line laid down by law 'cum modus et mensura non servatur.' In his day *transgressio* and *trespas* are just becoming prominent words in the English legal vocabulary; they serve to cover the wrongful acts which fall short of felony, the misdemeanours as well as the trespasses of later law.

[III. 3. § 1.] Dictum est supra quid sit actio et [f. 101 b] qualiter de obligationibus oriatur. nunc autem videndum qualiter dividatur. 'Et sciendum quod omnium actionum' sive placitorum (ut inde utatur aequivoce) 'haec est prima divisio, quod quaedam sunt in rem, quaedam in personam et quaedam mixtae.' item earum quae sunt in personam alia criminalia et alia civilia, secundum quod descendunt ex maleficiis vel contractibus. item criminalium, alia

¹ *delinquit* Dig. Ed. Reg.; *delinquitur* Vulg.

maior, alia minor, alia maxima, secundum criminum quantitatem. Sunt enim crimina maiora, et dicuntur capitalia, eo quod ultimum inducunt supplicium vel truncationem membrorum vel exilium perpetuum vel ad tempus. minora vero quae fustigationem inducunt, vel poenam pilloralem vel tumboralem vel carceris inclusionem, quandoque cum infamia, quandoque sine, secundum quod causa ¹ fuerit talis vel ² talis. ‘Ictus enim fustium infamiam non ‘irrogat, sed causa, propter quam id pati³ meruit.’ Item earum quae sunt in personam et quae ex delicto oriuntur, vel quasi, sicut actio iniuriarum, de qua civiliter agitur, quaedam maior est, quaedam minor. Est enim atrox iniuria et est levis, et secundum hoc sequetur poena maior vel minor, iuxta illud: *Quod tamen admissum, quae sit vindicta docebo.* Nec debet poena ad alios extendi quam ad suos auctores, nec ulterius progredi quam se extendit delictum. Item poterit iniuria sub se continere transgressionem, ut si quid praesumatur contra statuta regis et regni, excedendo modum et mensuram vel faciendo citra debitum, videlicet minus quam deberet, per malitiam et fraudem, negligentiam et omissionem. Item sunt actiones in personam civiles quae oriuntur ex contractu vel quasi, ut supra dictum est, videlicet ubi quis alteri tenetur ad aliquid dandum vel faciendum ex aliqua causa praecedente. Et notandum quod nulla actio civilis in personam criminaliter potest nec debet intentari. unde oportet quod iudex in qualibet actione tali factum et initium diligenter examinet, et secundum hoc procedat actio civiliter, et ⁴ si utraque pars vellet ⁵ criminaliter agere in civili. ut si quis actionem institueret contra alium criminaliter cum sit civilis, et diceret quod per feloniam excussisset pulverem de capa sua, vel quid tale, et hoc paratus esset disrationare: iudex factum examinando et causam, pronunciare deberet appellum esse nullum, et causam civilem et non criminalem. et hoc, etiam si appellatus paratus esset per corpus suum se ⁶ defendere. et etiam si per imperitiam esset inter eos

[f. 102]

¹ Omit *causa* Vulg.² *aut* Vulg.³ *plecti* Corb. Cr. Ed. Reg. Vulg.; *peti* Digby; *pati* Digest.⁴ *etiam* Reg.⁵ *voluerit* Vulg.⁶ Omit *se* Vulg.

duellum vadiatum, deberet devadiari per iudicium. Sed restat quaerendum utrum talis ulterius ad civilem actionem habere possit regressum vel non. Cum autem actio fuerit mere criminalis, institui poterit ab initio criminaliter vel civiliter: sed cum ¹ semel fuerit instituta civiliter, quaeritur an accusans mutare possit et agere criminaliter, et e contrario. Dicunt quidam quod a criminali descendere non poterit ad civilem minuendo, sed a civili ad criminalem augendo: quibus ² ego non assentio,³ cum in hoc casu admitti non deberet variatio.⁴

NOTES.

Passing by the chapters of the Institutes which deal with the various delicts, Bracton once more finds himself face to face with the title (4. 6) *de actionibus* whence he made his long digression through the law of obligations. That title consists of the establishment and definition of a few general principles which divide the Roman *actiones* into various classes. The first contrast is between actions *in rem* and actions *in personam*. Then follows the distinction between civil and praetorian actions. Then that between actions *rei persecuendae causa* and actions *poenae persecuendae causa comparatae*. Then we learn how the action may be *in simplum concepta*, *in duplum*, *in triplum*, and so forth. Then comes the contrast between actions *bonae fidei* and actions *stricti iuris*. There follows a discourse on the *plus petitio*. Azo, as we have said above (p. 140), takes this opportunity of reckoning up all the great distinctions which divide actions into various classes. He enumerates twelve. His work is far too elaborate for Bracton's purpose, who must make the best he can of the Institutional text.

The first of the grand divisions he can adopt. Actions are (1) *in rem*, (2) *in personam*, (3) *mixtae*. He immediately proceeds to make another distinction which he does not find in the Institutes; but it is already well marked in English procedure and is thrust upon his notice by the first words of Glanvill's book. Of personal actions or pleas (the introduction of *placita* as an equivalent for *actiones* seems to betray Glanvill's influence) some are criminal, some are civil. The following words seem to tell us that actions *ex maleficio* are criminal, while actions *ex contractu* are civil; but from the first half of this proposition Bracton will have to retreat hereafter. It will be observed that the distinction between civil and criminal here takes the place of the distinction between civil and praetorian. Bracton knows that he has no business to talk about the latter of these distinctions, while the

¹ Insert *criminaliter* Vulg. ² *quibuscum* Vulg.

³ Dig. Corb. Cr. Ed. Reg.; *assentior* Vulg. ⁴ *narratio* Cr. Ed. Reg.

former is a great reality. He endeavours, however, for a while to keep on the level of 'general jurisprudence,' and therefore in his division of crimes into greater and smaller he avoids the word *felonia*. For his talk about *infamia* he may have warrant in English practice, which excluded men who had been found guilty of certain crimes, in particular jurors attainted of perjury, from serving as jurors or witnesses. 'Ictus enim fustium. . . . pati meruit'—this maxim is from D. 3. 2. 22. We may doubt whether the punishment of whipping was inflicted by the temporal courts of Bracton's time; but fustigation was a common ecclesiastical penance. We next see that an action *ex delicto* may be civil, *i.e.* non-criminal, though Bracton had apparently denied this above. Then we have another attempt to define trespasses (*transgressiones*), which is tinged by etymology; in a case of *transgressio* there is excess or defect rather than a direct breach of law; but we can see that neither *iniuria* nor *transgressio* is a word which has a well settled orbit. Then comes an important and practical rule of law. No action which in truth is a mere civil action can be prosecuted in a criminal form. The judges must see that this rule is observed, even though both the parties are desirous of treating the case as a criminal one. The plaintiff may say 'In felony you beat the dust from my cloak, and this I am ready to deraign;' the defendant may be willing to defend himself by his body; nevertheless the judge is to dismiss the case, and it is very questionable whether after this the plaintiff can be allowed to retrace his steps and begin a civil action. This is of real importance in England. Men who have quarrelled about trifles will sometimes wish for a trial by battle, and for this purpose will use 'words of felony'; but in the interest of the public peace the judges are not to suffer this. If in such a case a battle has been waged, it must be unwaged. Bracton turns to another question of practical interest. Suppose that the wrongful act is a crime; the person injured has his choice between criminal and civil procedure. He elects one of the two. Can he afterwards, by a variation of his count, turn the civil into a criminal, or the criminal into a civil, suit. It seems to be generally allowed that he cannot degrade a criminal into a civil action. Having uttered the 'words of felony' which make his action (appeal) a criminal action, he must abide by them, he cannot descend from them. But about the converse case there is doubt. Some hold that after the suit has been begun, it can be 'augmented': that is to say, it can be converted from a civil into a criminal cause by the introduction of words of felony. With this opinion, however, Bracton does not agree. Elsewhere (f. 150 b) he seems to adopt it.

[f. 102]

[III. 3. § 2.] Personales vero actiones sunt quae competunt contra aliquem ex contractu, vel quasi, ex maleficio,

vel quasi, cum quis teneatur ad aliquid dandum vel faciendum, et locum habent adversus eum qui contraxit, et heredem suum, nisi sint¹ poenales: et dicuntur actiones nativae, eo quod nascuntur ex contractibus. et omnes fere personales actiones sunt ex contractu, sicut mutui, commodati, depositi, mandati, ex empto vendito, locato et conducto. Personales vero actiones quae nascuntur ex maleficio, aliae persequuntur poenam tantum, ut actio furti, aliae vero persequuntur ipsam rem et poenam, sicut actio vi bonorum raptorum, et ita sunt duplices, eo quod sunt rei persecutoriae et poenae, et ita tam in rem quam in personam. et, cum sint uno modo rei persecutoriae, competunt contra omnes qui possunt restituere, sive ille possideat qui spoliavit, sive alius. secundum vero quod fuerint poenales, non persequuntur nisi tantum auctores delicti: et quandoque competunt versus unum qui deliquit, cum possit restituere, cum sint coniunctae in una persona, et quandoque versus duos, vel plures, cum sint disiunctae et bifurcatae, cum ille qui deliquit non possideat nec restituere possit, et² ille qui possidet non deliquerit sed restituere possit. Item illarum quae sunt in personam ex maleficio vel quasi, quaedam sunt criminales et quaedam civiles. criminalium quaedam maiores, quaedam minores, et civilium eodem modo, secundum quod superius in parte tangitur.

NOTES.

The Roman division of actions is giving Braeton a great deal of trouble. He cannot make his English material fit into it. Near the beginning of this chapter he commits himself to the remark that almost all personal actions are *ex contractu*, and yet we know that all his criminal actions (the appeals) and his actions of trespass are personal. He seems to have been led astray by Inst. 4. 6. § 17. Compare these two passages:—

Instit.—*Rei persequendae causa comparatae sunt omnes in rem actiones. earum vero actionum quae in personam sunt, hac quidem quae ex contractu nascuntur fere omnes rei persequendae causa comparatae videntur: veluti quibus mutuam pecuniam vel in stipulatum deductam petit actor, item commo-*

¹ *fuit* Vulg.

² *nec* Vulg.

dati, depositi, mandati, pro socio, ex empto vendito, locato conducto.

Bract.—Omnes fere personales actiones sunt ex contractu, sicut mutui, depositi, mandati, ex empto vendito, locato et conducto.

In the face of this we can hardly acquit Bracton of having distorted what he could not understand. He plunges onward, so Azo would have said, from blunder to blunder. Among those personal actions which arise *ex maleficio* some are *poenae persecutoriae tantum*, others are *duplices*, being *rei persecutoriae et poenae*: that is to say, they are *tam in rem quam in personam*. Bracton is confounding two distinctions, and seems for a while to think that an *actio* which is *rei persecutoria* must be an *actio in rem*. His would-be illustrations are from Inst. 4. 6. §§ 18. 19, 'poenam tantum persequitur quis actione furti. . . . Vi autem bonorum raptorum actio mixta est, quia in quadruplo rei 'persecutio continetur, poena autem tripli est.' The remainder of the chapter seems to be Bracton's own. The great example of an action which seeks both the restoration of a thing and the infliction of a *poena* is the assize of novel disseisin, the commonest of all English actions, and this is constantly in his mind. One may have to bring the assize against *A* and *B* jointly: against *A* because he is the disseisor, and against *B* because he is the tenant. Against *A* the action is penal; he is no longer in possession of the tenement; against *B* it is *rei persecutoria* and not penal. And so the action 'bifurcates.' Then once more we are told that actions *ex maleficio* are either civil or criminal.

[f. 102]

[III. 3. § 3.] Actiones vero in rem sunt quae dantur¹ contra possidentem, qui nomine proprio possideat ex quacumque causa, et non alieno, quia habet rem vel possidet quam restituere potest, vel dominum nominare. ut si quis petat ab alio rem certam, fundum aliquem vel terram, et se contendat inde dominum,² et persequatur rem illam, et non eius pretium, nec eius aestimationem, nec tantundem quod sit eiusdem generis, et sit³ res corporalis immobilis quae petitur ex quacumque causa versus aliquem, qui nullo iure personali obligatus est. Et per hoc quod petens, rem petitam suam esse intendens, actionem instituerit versus tenentem, et tenens negaverit, in rem erit actio sive placitum, et hoc sive nomine proprio petat, sive ratione rei,

¹ Corb. Cr. Reg. Ed. Vulg.; *quaedam* Dig.

² Sic Dig. Reg. Ed.; *contendat habere ius et inde esse dominum* Vulg.

³ *sit* Dig. Cr. Ed. Reg.; *sic* Vulg.

quam ipse possidet, sicut viri religiosi vel rectores nomine ecclesiarum suarum, vel alii nomine alicuius universitatis sicut in rem communem: et hoc etiam sive principaliter petat ipsam rem, sive ius quod rei adhaereat sive tenemento, et quod a tenemento separari non possit. ut si quis petat advocationem alicuius ecclesiae, vel communam pasturae, vel quod liceat ei ire agere, vel quid tale quod [f. 102 b] consistat in iure, in rem erit placitum sive actio: quia huiusmodi iura omnia sunt res incorporales et quasi possidentur et insunt corporibus, et adquiri non possunt nec retineri sine corporibus quibus insunt, nec¹ aliquando sine corporibus ad quae pertineant.

NOTES.

Braeton turns to the *actiones in rem*, and as English law indubitably has actions which may well bear this title, he is able to write this section without much assistance from his Roman books. The characteristics of the real action that he makes prominent are these:— (1) it demands a certain thing, not the value of, nor any equivalent for, that thing; (2) it lies against the possessor as such, and (3) it is not based upon any obligation. Then it is explained that the action may be *in rem*, though the demandant claims 'not in his own 'right' but in right of a church. (In the phrase *ratione rei*, the *res* is not the thing demanded, but that *ecclesia* or the like which the demandant represents. The next phrase shows how vague is Braeton's notion of the *universitas* or corporation; the *res universitatis* is a *res communis*; see above, p. 95.) The thing demanded may be either a corporeal and immovable thing or some right that adheres to such a thing: for example, an advowson or common of pasture. This remark is suggested by Inst. 4. 6. § 2, but is quite in harmony with the English scheme of actions. Of such rights there may be a quasi possession. The last phrases of the section show (and this Braeton shows at length elsewhere) that the law of his time is still very uncertain as to whether and how such rights as an advowson or common of pasturo can be separated from the tenancy of land and exist 'in gross.'

[III. 3. § 4.] Dictum est supra si res sit immobilis [f. 102 b] quae petitur, nunc tamen² sit res mobilis quae petatur,

¹ Insert *haberi* Vulg. Probably the true reading is *nec alienari sine* and the *aliquando* is due to a misunderstood compendium.

² *tamen* Dig. Reg.; *autem* Corb. Cr.; *cum* Vulg.

sicut leo, bos, vel asinus, vestimentum, vel aliud quod consistat in pondere vel mensura. Videtur prima facie quod actio sive placitum esse debeat tam in rem quam in personam, eo quod certa res petitur, et quia¹ possidens tenetur restituere rem petitam. sed revera erit in personam tantum, quia ille a quo res petitur non tenetur praeceise ad rem restituendam, sed sub disiunctione,² vel ad rem vel ad pretium, et solvendo tantum pretium liberatur, sive res appareat, sive non. Et ideo si quis rem³ mobilem vindicaverit ex quacunque causa ablatam vel commodatam, debet in actione sua definire pretium, et sic actionem proponere : Ego talis peto quod talis restituat mihi talem rem tanti⁴ pretii : vel, Conqueror quod talis iniuste mihi detinet vel robbavit talem rem tanti pretii. alioquin non valebit rei mobilis vindicatio, pretio non appposito. Idem erit si res mobiles petantur quae consistunt in pondere, numero vel mensura, sicut massa, pecunia vel triticum, vel aliae quae in liquido consistunt, sicut vinum et oleum. quo casu, si huiusmodi res petantur, sufficit si implacitatus tantundem restituat quod sit eiusdem ponderis, numeri, generis et mensurae, et unde, quia praeceise non compellitur ad rem quae petitur, erit actio in⁵ personam, cum implacitatus per solutionem tantundem possit liberari.

NOTES.

This is one of the boldest and the most important sections in Bracton's book. One of the boldest, for, with a full consciousness of what he is about, he takes upon himself to contradict the Institutes about an elementary point in the classification of actions. One of the most important, for he is determining the use that Englishmen will make for six and perhaps many more centuries of the two words, 'real' and 'personal.' There is no real action, no *actio in rem*, for a movable. There is no real action : you may see this from the form of the plaintiff's count. He never simply demands a particular chattel ; he demands it or its value, and the defendant is quit of the action if he

¹ *quia* Dig. Corb. Cr. ; *quod* Vulg.

² *disiunctione* Corb. Ed. Vulg. ; *distinctione* Dig. Cr.

³ Omit *rem* Dig. Reg.

⁴ *talis* Vulg.

⁵ Insert *ipsam* Vulg. ; omit Dig. Cr. Ed. Reg.

pays the value of the thing. It has been suggested that Bracton here went wrong, and did an irreparable harm to the English law of future ages by denying that there was a real action for the recovery of a movable, and this on the mere ground that the plaintiff could be forced to accept a money equivalent instead of his chattel. It has been suggested that had Bracton looked a little deeper we might have had no talk of 'real' and 'personal' property. But to those who will carefully consider the matter it will probably seem that he could not have said that the action for a chattel was 'real' without breaking away from the law of his time—not merely from the technical terminology, but from the practical and substantive law. Behind the reason that he gives for his refusal to call the action for a chattel a real action—a reason which is concerned with the remedy given in the action rather than with the right asserted by it—there is a deeper reason. Bracton has not given it; he could hardly have stated it in express terms without coming into violent collision with his Roman texts and the best, the progressive, ideas of his time. He might have had to say: English law does not give any action founded on the *dominium*, the ownership, of a movable, because English law does not admit any right in movables that approaches in intensity to the Roman *dominium*. Suppose that *A* lends a horse to *B*, and that *B* dishonestly sells it to *C*. Has *A* any action against *C*? Suppose that *A* lends a horse to *B*, and that *C* unlawfully takes it from *B*. Has *A* any action against *C*? It is probable that English law in the past had said 'No' to both these questions, and that in Bracton's day it was just beginning to say, or to think about saying, 'Yes.' (See Pollock and Maitland, *Hist. Eng. Law*, ii. 148-181.)

[III. 3. § 5.] Est etiam ¹ actio mixta, tam in rem quam [f. 102 b] in personam. et ideo sunt mixtae, quia mixtam habent causam ad utrumque, sicut est divisio hereditatis inter coheredes participes, vel de proparte sororum, vel alio modo de proparte, secundum quod res fuerit dividenda ratione personarum vel ratione rei vel utriusque. et eodem modo si res dividenda fuerit inter vicinos non coheredes, vel si distinguendi sint fines agrorum inter vicinos et baronias per rationabiles divisas vel perambulationem. in quibus casibus huiusmodi actiones videntur esse mixtae tam in rem quam in personam, cum quilibet eorum ² sit actor et reus. actor tamen dici poterit ille qui prius ad iudicium provocaverit. et ita comparatae sunt quaedam actiones sola

¹ autem Vulg.

² Dig. Corb. Cr. Ed. Reg.; sit eorum actor Vulg.

[f. 103]

gratia rei persequendae, vel sola gratia poenae persequendae et sic sunt¹ simplices, vel gratia utriusque, et sic sunt duplices, vel tam in rem quam in personam, et sic sunt mixtae, in rem ratione rei principalis, in personam gratia personarum praestationum. {Item mixta esse poterit et mixtam causam habere, secundum quod fuerit rei persecutoria et poenalis, et ita erit quaelibet actio in rem. persequitur enim rem ipsam et poenam propter iniustam detentionem. Et eodem modo de actione in rem et in personam, et ita possunt esse mixtae et mixtam habere causam quaelibet criminalis et civilis, sive oriatur ex maleficio vel quasi.²} Sunt quaedam quae aliquando fuerunt³ perpetuae et durare solent⁴ sine temporis praefinitione. hodie vero fere omnes infra certa tempora limitantur, pro defectu probationum, et sic sunt⁵ temporales, secundum quarundam actionum diversitates. fere dico, propter res quae de iure gentium pertinent ad coronam propter privilegium regis, sicut de rebus quae in nullius bonis sunt, nec habent dominum. item de rebus et libertatibus⁶ quae pertinent ad dignitatem domini regis et coronam, et in quibus casibus nullum tempus currit contra ipsum si petat, cum probare non habeat necesse, et sine probatione obtinebit, si implacitatus warantum non habuerit nec specialem libertatem, quia se ex longo tempore non defendet. Si aliquae vero sint actiones quae ex quacumque causa dentur in heredes vel contra, dici poterunt transitoriae, eo quod transeunt ad heredes vel contra.

NOTES.

Bracton is still struggling with Inst. 4. 6. He has to tell us of the two senses in which actions may be 'mixed.' They may be partly *in rem* and partly *in personam*; and again they may be partly recuperatory (*rei persecutoriae*) and partly penal. The former class of mixed actions is represented in Roman law by the *actio familiae erciscundae*, which in Bracton's eyes is the same as the English partition action (*de*

¹ Dig. Corb. Cr. Reg.; *sic sicut* Vulg.

² This passage is not in Dig., and may be an afterthought. It is in Corb. Cr. Ed. Reg. Gl. Sh.

³ *fiant* Vulg.

⁵ Insert *tantum* Ed.

⁴ Insert *vel quasi* Ed.

⁶ Insert *et dignitatibus* Ed. Vulg.

rationabili parte or *de proparte sororum*), and also by the action *finium regundorum*, which is the English boundary action *de rationabilibus divisis*. As to the other class of mixed actions, we have a curious passage, which seems to be a marginal afterthought. Bracton thinks that every action *in rem* is in this sense a mixed action, for the unsuccessful tenant will not only have to restore the disputable land but will also be amerced *propter iniustam detentionem*. This is a very true remark, though it leads to a flat contradiction of the Institutional text (§ 17), which puts before us the *actio in rem* as purely recuperatory. Every English action aims at a *poena* (amercement or fine), whatever else it may aim at.

The distinction between perpetual and temporal actions, and that between transitory and non-transitory actions, Bracton obtains by looking forward to Inst. 4. 12. His remark that in former times some actions were perpetual is derived from the following words:—‘*Hoc loco admonendi sumus eas quidem actiones quae ex lege senatusve consulto sive ex sacris constitutionibus proficiscuntur perpetuo solere antiquitus competere.*’ It is very possible, however, that this remark is in full harmony with English tradition, and that the older English actions had been *perpetuae*. Then Bracton, without warrant in the Institutes, tells us that as regards franchises, *Nullum tempus currit contra Regem*. The king has no need to offer a proof when he challenges a franchise, for there is a presumption that all *regalia* belong to the king and to no one else.

Of the ‘transitory’ character of actions, of active and passive transmission to heirs, Bracton will speak more at length hereafter.

[III. 3. § 6.] Item actionum, quaedam conceptae sunt [f. 103] in simplum, quaedam in duplum, quaedam in triplum, quaedam in quadruplum, et ita competere poterunt versus unicam personam, vel plures, et secundum quod fuerint rei persecutoriae, vel poenae. Item ex uno delicto plures poterunt oriri actiones contra unum vel plures, et quandoque una actione poterunt terminari omnes. Item plures poterunt competere actiones alicui contra alium, quarum una erit praeiudicialis et praeambula et prius terminanda. Item in uno libello possunt duae contineri actiones, quarum una in personam, alia in rem, et quarum quaelibet simplex erit per se. Item actionum quaedam directa, quaedam indirecta, quaedam contraria. Item quaedam universalis,¹ quaedam generalis, quaedam singularis. Item

¹ *universalis* Ed.; *utilis* Corb. Cr.; ambiguous compendium, Dig. Reg. Sh.; *vulgaris*, Vulg. (!)

quaedam communis, quaedam propria, secundum quod res quae petitur communis fuerit vel propria. Item earum quae sunt in rem, quaedam proditae sunt super ipsa possessione, et quaedam super ipsa proprietate. est enim possessio rei et proprietas.

NOTES.

Bracton adds other distinctions between actions which are suggested by Azo. It is difficult to acquit him of the charge of believing that an *actio in simplum concepta* is an action brought against a single person, while an action against three co-defendants would be *in triplum concepta*. We may hope that he did not mean this; but appearances are against him. By a *libellus*, as we shall see below, he means a writ. Whether he could have explained all the terms that he has strung together—e.g. *directa* and *contraria*—we may doubt.

[f. 103]

[III. 3. § 7.] Actionum autem civilium et in rem, sicut rei vindicatio, alia confessoria, alia negatoria: confessoria¹ cum dicat quis aliquam rem corporalem suam, sicut hunc servum, hunc fundum, hunc equum, hanc vestem. {Item in rem quaedam recuperandae possessionis causa, quaedam adipiscendae, et quaedam retinendae. recuperandae, hoc est, seisinæ propriæ prius habitæ, per assisam novæ disseisinæ. adipiscendae, hoc est alienæ, videlicet alicuius antecessoris. retinendae, sicut interdicta ne quis alteri vim faciat. Item quandoque gratia recuperandae tam possessionis quam proprietatis simul. Item quandoque causa recuperandae possessionis quam quis ei concessit ad terminum vitæ vel annorum.²} Item confessoria est, qua dicis tibi ius esse eundi per fundum vicini tui, aquamve ducendi, eo invito, et huiusmodi. et hæc actio in rem ideo dicitur quia rem tuam incorporalem petis, scilicet ius eundi per fundum, et ideo confessoria dicitur, quia constituta est verbis affirmativis. Actio vero negatoria est

¹ Omit *confessoria* Dig. Corb. Cr. Reg. Gl.; *concessoria* Ed. over erasure.

² This passage is not in Dig.; in other MSS. it appears in several different places. Probably it is a marginal *addicio*.

quam dominus fundi intendit adversus te solito euntem per fundum suum, dicens tibi non esse ius ire per fundum suum. et haec actio dicitur in rem, quia dominus fundi in hoc suam vindicat libertatem. Et huiusmodi actiones non¹ competunt de dominio rei, sed de iure praediorum.

NOTES.

We still pick our way among Azonian distinctions. Bracton seems to think that the proprietary action for land is an *actio confessoria*. The English law of his day had at least one action which deserved to be called *negatoria*: namely, the *Quo iure*. You turn out your beasts on my land; I bring an action asking by what right (*quo iure*) you claim common. Such actions were not unfrequent.

The passage about the interdicts seems to be a marginal afterthought. The assize of novel disseisin is likened to an interdict for the recovery of possession. The assize of mort d'ancestor to an interdict for the acquirement of possession. We observe that in this place even the novel disseisin is *in rem*. Elsewhere (below, p. 180) it is *in personam* and *ex delicto*. The action for the recovery of possession held for a term of years is the new *Quare cecit infra terminum*.

[III. 3. § 8.] Item actionum civilium in personam ex [f. 103] contractu vel quasi, quaedam nascuntur ex pacto. Ex quasi contractu nasci dicuntur quae nec omnino ex pacto, nec omnino ex maleficio, sed tamen maiorem cum pactis habent affinitatem quam cum maleficiis. Ex maleficiis nascuntur actiones quibus delicta hominum coercentur, sicut condictio rei furtivae, actio vi² bonorum raptorum actio legis Aquiliae et iniuriarum. Ex quasi maleficio nascuntur actiones quae nec ad pacta accedunt nec proprie [f. 103 b] ad maleficia, sed similia sunt maleficiis quam pactis. Ex contractu et obligatione oriuntur actiones, secundum quod superius dictum est, aliae re, aliae verbis,³ aliae litteris, aliae consensu. re, ut condictio⁴ certi de mutuo. condictio⁵ autem certi competit ex omni causa et obligatione ex qua quid certum petitur, sive ex contractu certo vel

¹ Omit *non* Corb.; interline *non* Ed. Sh.

³ *verbo* Vulg.

⁴ *conditio* Vulg.

² *vz* = *videlicet* Cr. Vulg.

⁵ *conditio* Vulg.

incerto. Causae vero huiusmodi actionum sunt quattuor contractus superius ¹ nominati,² de quibus superius dictum est in titulo de donationibus, ut do ut des, do ut facias, facio ut des, facio ut facias.

Item est petitoria hereditatis actio, et competit illis, quibus ius merum descendit ab antecessoribus, sicut heredibus propinquioribus. [§ 9.] Possessoria vero hereditatis petitio est de possessione propria, et quae dicitur actio unde vi, per quam restituitur spoliato sua possessio, et dici poterit assisa novae disseisinae. Item dicitur possessoria petitio de possessione aliena, sicut alicuius antecessoris, de aliquo ³ de quo antecessor obiit seiscitus ut de feodo, quae dicitur actio quorum bonorum, sive assisa mortis antecessoris.

NOTES.

The immediate source of this paragraph is not obvious. Azo apparently avoids the task of saying what it is that is common to the various cases of 'quasi contract,' and, indeed, he seems to deny that anything beyond an enumeration of them is possible. His remark on Inst. 3. 27 is 'Tradit autem [Iustinianus] de his doctrinam non in 'genere, quia nec poterat, sed per species ponendo exempla.' And the quasi delicts (Inst. 4. 5) he treats in much the same way. Bracton, it will be observed, gives no example either of quasi contract or of quasi delict. His examples of delicts he can easily obtain by running his eye over Inst. 4. 1-4. Once more he takes us back to the classification of contracts. He here mentions *re, verbis, litteris, consensu*, but omits *traditione* and *iunctura*. Then he borrows a fragment from Azo's Summa of the Code (4. 2): 'Est autem sciendum quod ubi 'certum quid est in obligatione, datur conditio certi generalissima, 'quae competit ex omni causa et ex omni obligatione, sive sit nata ex 'certo contractu, sive ex incerto, dummodo tamen pura sit obligatio.' Then Bracton seems to say that the causes of a *conditio certi* are the four innominate contracts. The Vulgate text has here 'quattuor contractus superius nominati de quibus superius dictum est in titulo de 'donationibus.' This makes sense, but not very good sense, for it represents Bracton as saying twice over that the four contracts have been already mentioned. (He has spoken of them on f. 19, in his title *de donationibus*.) In the Digby MS. the first *superius* is missing, and we should hardly do wrong in reading *innominati* instead of *nominati*, though we have no MS. which we can vouch for the emendation.

¹ Corb. Cr. Ed. Reg.; omit *superius* Dig. ² Sic Dig. Cr. Ed. Reg. Vulg.

³ Sic Dig. Corb. Cr. Ed. Reg.; insert *tenemento* Vulg.

The term *innominate* had already been bestowed on these pacts, and appears in Azo's work.

Then, apparently, Bracton intends to give as examples of actions *quasi ex contractu*, the *petitoria hereditatis petitio*, and the *possessoria hereditatis petitio*. In Azo's classification the *hereditatis petitio* is an *actio mixta tam in rem quam in personam*, and in so far as it is *in personam* it is *quasi ex contractu* (Azo, Summa C. 3. 31, referring to D. 5. 3. 25. § 18). The *possessoria hereditatis petitio* is mentioned by Azo in a chapter that was under Bracton's eye (Azo, Summa Inst. 4. 6): 'Possessoria autem hereditatis petitio datur his 'qui succedunt per bonorum possessionem . . . ut ff. de possessoria 'he. pe. l. i. et ii. [D. 5. 5].' Bracton makes a truly marvellous mess. He identifies *hereditatis actio petitoria* with the writ of right, which therefore, though it is the very type of a real action, must be mixed. Then he splits the *possessoria hereditatis actio* into two. It lies where a man is despoiled of possession, and in that case it is the assize of novel disseisin and the *actio unde vi*. It lies also where a man's ancestor dies seised as of fee and a stranger to the inheritance abates, and in this case it is the assize of mort d'ancestor and the *actio quorum bonorum*. The habit of speaking of land as 'inheritance' (Fr. *héritage*) has something to do with this strange result. Even where an ousted possessor in the most possessory of all our actions is relying solely on seisin and disseisin, he is nevertheless in some sort demanding 'heritage,' and his action therefore is *hereditatis petitio possessoria*. Elsewhere, however, the novel disseisin is described as founded purely on delict. But it is needless to explore all the ineptitudes of these wonderful sentences. If all Bracton's work had been like this, it would have been rightly forgotten long ago.

[III. 4. § 1.] Item videndum cui competant actiones [f. 103 b] quae ex maleficio oriuntur, et contra quem. et sciendum quod actio furti sive condictio domino rei competit contra furem et eius successorem et contra quemlibet detentorem. Actio vi bonorum raptorum de rebus mobilibus vi ablatis sive robbatis datur domino rerum vel de cuius custodia surreptae sunt, et qui intravit in solutionem erga dominum suum, ita quod eius intersit¹ agere. Actio vero legis Aquiliae de hominibus per feloniam occisis vel vulneratis dabitur propinquioribus parentibus, vel extraneis homagio vel servitio obligatis, ita quod eorum intersit agere. [§ 2.] Actio vero iniuriarum competit ei qui contumeliam

¹ eius sit Cr. Ed. Reg.

vel iniuriam passus est, contra eum qui iniuriam intulit, vel pulsavit, verberavit et male tractavit, et in qua iudex eum tanti condemnabit quanti actor dixerit se nolle iniuriam sustinuisse, adhibita tamén per iudicem taxatione. [§ 3.] Actio quod metus causa datur ei qui probabili metu coactus rem suam tradidit, vendidit, vel promisit, versus eum qui metum intulit. et dicitur metus probabilis, qui in virum constantem cadere posset, et non in hominem meticulosum. Actio de dolo competit ei contra quem dolus committitur. Actio vero sive interdictum unde vi, secundum¹ quod duplex est, scilicet rei restitutoria et poenalis, datur contra eum qui vi deiecit, et datur ei qui vi deiectus est, ad restitutionem possessionis rei immobilis, qua quis vi deiectus est. et quo casu duplex est in persona deiectoris, secundum quod inferius dicetur in assisa novae disseisinae, et in qua nec mortalitas nec casus fortuitus liberat deiectorem. [§ 4.] Actio sive interdictum quod vi aut clam datur adversus eum qui in solo vel fundo alterius novum opus manu factum construxit vel destruxit et se occultavit ne sibi prohiberetur. et qui talia construxit vel destruxit per hanc actionem compelletur ut id quod fecit in pristinum statum suis sumptibus reponat, ut res sit sicut solet esse et debet. Huiusmodi vero actiones sive interdicta non dantur heredibus nec in heredes, in eo quod poenalia sunt, sed dantur in eo quod sunt restitutoria. [§ 5.] Actio vero sive interdictum de itinere actuque privato datur adversus eos qui iniuste aliquem prohibent uti sua servitute. Ait enim praetor: quo itinere actuque privato² agitur, vel via³ hoc anno⁴ nec vi nec clam nec precario ab adversario usum est, quo minus ita utatur, vim fieri veto. Et haec omnia interdicta ex maleficio oriuntur. [§ 6.] Est etiam interdictum sive actio quorum bonorum quae non oritur ex maleficio, sed ex quasi contractu, et datur heredibus propinquioribus de scisina⁵ antecessoris,

[f. 104]

¹ Dig. Cr. Ed. Reg.; *scilicet* Vulg.² Dig. 43. 18. 1 pr. requires the insertion of *quo de*.³ *vel vi* Cr. Reg.; *vel via* Ed. with *a* erased.⁴ Insert *ubi* Vulg; *ut* Cr.; omit Dig. Corb. Reg.⁵ Dig. Corb. Cr. Reg.; insert *mortis* Vulg.

et datur adversus quoslibet possidentes. [§ 7.] Actionum autem civilium quae sunt in rem, aliae datae sunt super ipsa possessione, aliae propositae super ipsa proprietate. Et si super eadem re uni petenti plures competant actiones, sicut assisa novae disseisinae, mortis antecessoris super possessione, et breve de ingressu et breve de recto super proprietate, simul et semel omnibus uti non poterit: sed unam eligat quam voluerit, et una electa nunquam habebit regressum ad alias, pendente illa. quod si ad aliam recurrat, impetratio de secunda non valebit. Si vero quocumque modo ab incepta recesserit per licentiam vel iudicium, in proponendis actionibus hunc ordinem observabit. si enim ab assisa novae disseisinae recessum fuerit, statim habeatur recursus ad assisam mortis antecessoris, si competat, et postea ad ¹ breve de ingressu, et ad ultimum ad breve de recto, et ita ascendendo de possessione usque ad proprietatem, sed non e contrario descendendo, quia nunquam de brevi de recto fit descensus ad alia brevina inferiora: quia qui semel egerit per breve de recto, totum ius tam super possessione quam super proprietate deducit in iudicium, secundum quod videri poterit infra ubi tractatur de brevi de recto. Nunquam enim a causa proprietatis fit descensus ad causam possessionis, nec postquam semel actum fuerit de seisinā antecessoris non ² poterit quis agere de seisinā propria per assisam. [§ 8.] Cum autem ab actione in rem quis semel recesserit, vel ab actione se retraxerit, vel iudicium contrarium habuerit, nunquam ad eandem redire poterit, cum semel ³ extincta non reviviscit. si autem ex quacumque causa a brevi se retraxerat pro aliquo defectu, et non ab actione, aliud erit. [§ 9.] Item actionum quaedam praeiudiciales, quae oriuntur ex incidentibus quaestionibus vel emergentibus, in quibus quaeritur utrum aliquis sit ingenuus vel libertinus, et si libertinus, ⁴ liber vel servus, filius annon, et si filius, utrum legitimus vel bastardus, et huiusmodi. et dicuntur praeiudiciales, quia prius iudicantur quam actio principalis, et ut per hoc

¹ Omit *ad Dig. Cr. Reg.*

² non *Dig. Cr. Ed. Reg.*

³ *Dig. Cr. Ed. Reg.*; insert *actio Vulg.* ⁴ Omit *et si libertinus Cr. Ed. Reg.*

remaneat principalis vel procedat in quacumque causa¹ incidenti vel emergenti: ut si incidat conventio sive pactum, res iudicata vel finis factus, vel alia quaevis exceptio.

NOTES.

Bracton in a desultory way is endeavouring to identify English with Roman actions, having in view chiefly those which arise *ex maleficio*. Successive titles of the Institutes (4. tit. 1. 2. 3.) provide him with the *actio furti*, the *vi bonorum raptorum*, and the action on the *Lex Aquilia*. Apparently when here and elsewhere Bracton speaks of the *actio furti* as of a practicable English action, he is referring to the exceedingly ancient procedure for the recovery of stolen goods which is lingering in the local courts, though its place is gradually being taken in the royal court partly by the definitely criminal appeal of larceny, partly by the civil actions of trespass and detinue. The old action could, it would seem, be brought though the plaintiff made no charge of theft against the defendant. The plaintiff alleged that the goods had been stolen from him, and that the defendant possessed them. To this charge the normal defence would be the voucher of a warrantor. Therefore it is that Bracton, who has mixed up the Roman *actio furti* with the *condictio furtiva* ('*actio furti sive condictio*') says that this action will lie against the thief and his successor and anyone who holds the goods. The Institutes (4. 1. § 19) tell him that the *condictio* is available '*contra ipsum furem here- demve eius, licet non possideat.*' Also he sees that there can be a *vindicatio* against a possessor who is not the thief. He probably identifies the *actio vi bonorum raptorum* with the appeal of robbery.

It will be noticed that he gives the *actio furti sive condictio* only to the *dominus* of the stolen goods, while the *actio vi bonorum raptorum* lies for the owner or for the person from whose custody the goods were taken if he has an interest in them. This is a curious departure from the Institutes, and one that we should hardly have expected. All that we know of the history of the old English procedure for the recovery of stolen goods would lead us to believe that it was competent only to the person from whose possession the chattels had been taken, and that, therefore, if the goods were taken from the bailee, the action was open to the bailee and not to the bailor. In the Institutes (4. 1. § 13) the *actio furti* is competent to many bailees—'*Furti autem actio ei competit, cuius interest rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si eius intersit rem non perire.*' In this respect the difference between the *actio furti* and the *actio vi bonorum raptorum* is not a strongly marked one. 'The distinction,' says Mr. Moyle (vol. p. 527),

¹ Insert *tam* Vulg.; omit Dig. Cr. Ed. Reg.

'between the persons who could sue on theft, and those who could sue on robbery seems to consist in the depositary being in some cases allowed the latter where he could not bring the former action, or perhaps in some persons having the *actio bonorum vi raptorum* who, though having an interest, have no real right, possession or detention.' The explanation may perhaps be that Bracton, in the furtherance of a movement which is gradually giving the bailor remedies against third persons, is inclined for the moment to go great lengths in the protection of mere *dominium*; but then we cannot be certain that there are not some kinds of bailment which in Bracton's view make the bailee *dominus rei*. English law is hesitating about these questions.

In his account of the persons who have the action of robbery Bracton uses a phrase current in England—'*datur domino rei vel de cuius custodia surreptae sunt, et qui intravit in solutionem erga dominum suum*'¹ ita quod eius intersit agere.' Apparently the phrase here marked by italics—'who has entered into payment in relation to his lord'—is equivalent to 'who has become accountable to his lord.' Bracton is thinking of the case of a servant bringing an appeal of robbery in respect of goods belonging to his master. His appeal fails unless he is accountable to his master for the loss of the things. It is important that mere servants who have no interest in the goods shall not be set on to fight by masters who will not risk their own lives.²

The identification of the action given by the Lex Aquilia with the appeals of homicide and wounding is surprising. The excuse for it is that in the text of the Institutes (4. 3) the slaying of a *homo* (slave) is very prominent:—'*Damni iniuriae actio constituitur per legem Aquiliam. eius primo capite cautum est, ut si quis hominem [alienum alienamve quadrupedem quae pecudum numero sit] iniuria [= per feloniam] occiderit. . .*' But Bracton can hardly have read through this title and yet have seriously thought that our appeals of felony were governed by the Lex Aquilia.

The *actio iniuriarum* is our action for assault and battery—'*verberavit et male tractavit*' is the formula in common use. There is here, of course, a fair enough analogy between the Roman and the English action. As to the damages, Bracton has before him Inst. 4. 4. § 7: '*Sed postea praetores mittebant ipsis qui iniuriam passi sunt eam aestimare, ut iudex vel tanti condemnnet, quanti iniuriam passus aestimaverit, vel minoris, prout ei visum fuerit.*' Bracton, however, uses a good English phrase current in the courts, namely, '*quanti actor dixerit se nolle iniuriam sustinuisse.*' The plaintiff often 'lays the damages' in such a phrase as this: 'so that he would

¹ *Select Pleas of the Crown*, pl. 126.

² The phrase seems to originate in this way: If I enter into payment of a debt, i.e. if I pay something on account of that debt, I acknowledge my liability; and so 'to enter into payment' becomes an equivalent for 'to become accountable.'

'not have sustained that damage for twenty shillings nor the shame for 'ten shillings.' The sum thus mentioned is the maximum that the plaintiff can obtain in the action.

Having run over those delicts which are prominently and consecutively mentioned in the Institutes, Bracton must now look about him for other cases. Whether he is guided by any text is not very clear, but he seems to say nothing that he could not have easily obtained from Azo. He first mentions the action *quod metus causa*. His account of *metus* goes back ultimately to D. 4. 2. 6—'Metum autem non vani hominis, sed qui merito et in homine constantis simo cadat, ad hoc edictum pertinere dicemus.' But more immediately it seems to come from Azo's comment on C. 7. 18—'Metus autem distinguitur, quia alius non est probabilis, alius probabilis. Non est probabilis qui cadit in hominem miserum vel timidum vel inconstantem. Probabilis qui caderet in hominem discretum et constantem.'

A bare mention of the *actio doli* must be enough. English law as yet hardly knows of deceit as a cause of action.

The *interdictum unde vi* is the assize of novel disseisin. In a certain sense this is quite true. Henry II.'s assize was, no doubt, suggested by the *actio spolii* of the canonists, which was the descendant of the Roman interdicts. What Bracton here says of it is practical English law: it is both restitutory and penal, and when brought against a single defendant, who is both disseisor and tenant, it is *duplex*.

Bracton seems to identify the interdict *quod vi aut clam* [D. 43. 24] with the assize of nuisance, and the *de itinere privato* [D. 43. 19] with a *quod permittat*. The words of the edict that he endeavours to quote should run thus [D. 43. 19. 1. pr.]—'Praetor ait: Quo itinere actumque privato, quo de agitur, vel via hoc anno nec vi nec clam nec precario ab illo usus es, quo minus ita utaris, vim fieri veto.' Lastly, the assize of mort d'ancestor is an equivalent for the *actio quorum bonorum*.

At the beginning of the next section [§ 7] we have one more hopeless attempt to force the English actions into the Roman pigeon-holes. The possessory assizes are now represented as actions *in rem*, though we have just learnt that the novel disseisin arises *ex maleficio* and the mort d'ancestor *quasi ex contractu*. Then we have a piece of genuinely English doctrine. The various actions by which the possession of land can be obtained are a graduated hierarchy. Some are higher, some are lower. At the bottom stands the novel disseisin, which is the most possessory; at the top the writ of right, which is the most proprietary. Possessoriness and proprietariness (if such words may be coined) are matters of degree. The best conceivable right (*ius merum*) is that which flows from the most ancient seisin. You may ascend the scale of actions, but you cannot descend it. This doctrine cannot be suppressed, and surges up through the Roman crust. The

difference between a withdrawal from the action (*ab actione*), and a withdrawal from the writ (*a brevi*) is already well known in the English courts.

Bracton then seems to cast one last look at the title *de actionibus* [Inst. 4. 6] to see whether there is anything more worth taking, and his eye lights on the sentences about *præiudicia* (§ 13): ‘Præiudiciales actiones in rem esse videntur, quales sunt, per quas quaeritur, an aliquis liber vel an libertus sit, vel de partu agnoscendo. ex quibus fere una illa legitimam causam habet, per quam quaeritur, an aliquis liber sit: ceterae ex ipsius praetoris iurisdictione substantiam capiunt.’ The influence of this sentence on Bracton’s text is obvious; but he is not really thinking of the *actiones præiudiciales* of the Institutes. He is thinking of cases in which the defendant pleads a special plea (*exceptio*) which raises some question quite different from that which the plaintiff raised: *e.g.* the very common *exceptio villenagii*. The plaintiff brings, let us say, an assize of novel disseisin, and the defendant meets him with ‘You are my villain.’ Then, according to Bracton and the English practice of his time, the main question is kept in suspense while the preliminary question is decided. We have to remember that in some cases the trial of the preliminary question will take place in a court different from that which has possession of the action. The defendant pleads an *exceptio bastardiae*, and the trial of the preliminary question thus raised will proceed in the court christian. Meanwhile the action is pending in the king’s court, and the trial before the ecclesiastical tribunal will decide whether it is to proceed (*procedat*) or be stayed (*remaneat*). The misunderstood language of the Institutes induces Bracton to speak as though there were various actions, when really he means that there are various questions in one action.

The words *incidenti vel emergenti* show that he has looked at Azo, who in his *Summa* of the Code *de ordine iudiciorum* (3. 8) approaches the question with which Bracton is concerned. He draws a distinction between ‘incidental’ and ‘emergent’ issues: ‘An autem super incidenti quaestione debeat pronuntiari quaeritur. Et ait [Bulgarus] nunquam esse nisi ubi criminalis incidit civili et o converso . . . Pla[centinus] autem ait semper esse pronuntian- dum de incidenti quaestione. . . . Domino autem meo [Johanni Bassiano] videbatur distinguendum inter incidentes et emergentes quaestiones vel exceptiones.’ The opinion of Bulgarus holds good for incidental, that of Placentinus for emergent, questions. This distinction we need not pursue; Bracton, whether he understood it or not, rejected it (*in quacumque causa incidenti vel emergenti*). Azo mentions as a cause for an ‘incidental exception’ *pactum de non petendo*, also *res iudicata*. Bracton borrows these illustrations, and adds the *finis factus*, the fine levied in court.

[f. 104 b]

[III. 5. § 1.] Ubi terminari debeant actiones¹ sive placita videndum. et sciendum quod si actiones criminales sint, in curia domini regis debent terminari, cum sit ibi poena corporalis infligenda, et hoc coram ipso² si tangat personam suam, sicut crimen laesae maiestatis, vel coram iustitiariis ad hoc specialiter constitutis,³ si tangat personas privatas. Vita vero et membra hominum sunt in manu⁴ regis, vel ad tuitionem, vel ad poenam cum deliquerint, nisi ita sit forte quod aliquis gaudeat speciali libertate, quod habeat tol et tem etc. ut infra. Ad dominum regem pertinet et coronam suam cognoscendi⁵ de crimine laesae maiestatis: ut de nece, vel seditione⁶ personae suae vel regni vel exercitus sui. item crimen falsi, quod sub se continet plures species, et multipliciter fieri poterit, ut si quis falsaverit sigillum domini regis, vel falsam monetam fabricaverit, vel de non reprobam⁷ fecerit, vel si aliquis falsario consenserit scienter. item occultatio thesauri inventi fraudulosa, placitum de pace⁸ domini regis infracta. et ista graviora sunt crimina et maiora, quia principaliter tangunt personam ipsius regis. Sunt etiam crimina aliquantulum minora, eo quod in parte tangunt ipsum regem propter pacem suam infractam, in parte privatas personas, contra quas delinquitur, sicut crimen furti, crimen robbieriae contra pacem, et plagiarum. item crimen homicidii, sive sit casuale vel voluntarium, licet eandem poenam non contineant, quia in uno casu rigor et in alio misericordia. item crimen incendii nequiter facti. item raptus virginis, vel sanctimonialis, vel matronae⁹ honeste viventis. item crimen robbieriae et imprisonamenti contra pacem. item de libero homine imprisonato. quorum omnia poenam corporalem infligunt, et secundum quod fuerint maiora vel minora, gravem inducunt poenam vel minus gravem. Inducunt enim quaedam ultimum supplicium cum poena graviore et tor-

¹ Insert *criminales* Vulg.; omit Dig. Corb. Cr. Ed. Reg.² Insert *rege* Vulg.; omit Dig. Corb. Cr. Ed. Reg.³ Dig. Corb. Cr. Ed. Reg.; *assignatis* Vulg.⁴ Insert *domini* Vulg.⁵ Dig. Corb. Cr. Ed. Reg.; *cognoscere* Vulg.⁶ Dig. Cr. Ed. Gl. Reg.; Twiss reports *seductione* from some MSS.⁷ *re proba rem probam* Twiss.⁸ Omit *de pace* Dig.⁹ Omit *matronae* Dig.

mentis, ne statim deficiant, quandoque sine tormentis. item quaedam inducunt membrorum truncationem, quaedam exilium perpetuum vel ad tempus, et eodem modo imprisonment. Poenae autem ad correptionem ¹ hominum sunt inventae, ut quos divinus timor a malo non revocat, temporalis saltem poena ² cohibeat a peccato. ipse enim deus propter iniquitatem corripit homines.

NOTES.

Though there are romanesque phrases in this section, it consists in the main of pure English law. A reference is made to the justiciary franchises by the words *tol et tem etc.*, for some lords have capital justice in their hands. Bracton's *sedition* is better translated by *betrayal* than by *sedition*. The *sedition personae regis vel regni vel exercitus sui* is a betrayal of the king's person, realm, or army. Then the various felonies are mentioned: homicide, wounding, larceny, robbery, arson, rape, and false imprisonment. When Bracton speaks of *tormenta* he is thinking of the drawing which precedes the hanging of a traitor.

[III. 6. § 1.] Genera poenarum quibus afficiuntur malefactorum sunt haec: sunt autem quaedam quae adimunt vitam vel membra: sunt autem quae auferunt civitatem, burgum, vel provinciam: sunt autem quae continent exilium perpetuum vel ad tempus, vel corporis coercionem, scilicet, imprisonment vel ad ³ tempus vel imperpetuum: sunt quaedam quae fustigationem, verberationem, poenam pilloralem et tumboralem et damnum cum infamia inducunt: sunt etiam quaedam quae dignitatis et ordinis inducunt depositionem ⁴ vel alicuius actus privationem vel prohibitionem. 'Et non alio modo puniatur quis quam secundum quod se habeat condemnatio, ut si gladio animadverti debeat in aliquem, tunc non securi nec telo neque fustibus vel laqueo alio quove modo.' 'Item qui vivi exuri debent, non eis verberibus noceatur, nec virgis, nec tormentis: quia plerique deficiunt dum torquentur,' [f. 104 b]

¹ *correctionem* Reg. Ed.; *corruptionem* Cr.; *correctionem et correptionem* Vulg.

² Insert *coerceat et* Vulg.; omit Dig. Cr. Ed. Reg.

³ Omit *ad* Dig.

⁴ *deponere* Dig.

et hoc nisi aliter exigat enormitas delicti. ‘Solent praesides
 ‘in carcere continendos damnare ut in vinculis continean-
 ‘tur, sed huiusmodi ¹ interdictae sunt a lege, quia carcer ad
 ‘continendos homines ² et non puniendos haberi debeat.’
 ‘Respicendum est iudicanti, ne quid aut durius aut remis-
 ‘sius constituatur quam causa deposcit, nec enim aut
 ‘severitatis aut elementiae gloria affectanda est: sed per-
 ‘penso iudicio, prout quaeque res expostulat, statuendum.
 ‘In levioribus causis proniores ³ esse debent ad lenitatem.
 ‘in gravioribus vero poenis severitatem legum cum aliquo
 ‘temperamento benignitatis subsequi. et poenae potius
 ‘molliendae sunt quam exasperandae.’ ‘Delinquunt
 ‘latrones proposito per factionem. ebrii impetu, per ebrieta-
 ‘tem, cum ad manus vel ferrum pervenitur. casu, cum
 ‘per infortunium, ut si aliquis venando per telum in feram
 ‘missum hominem interfecerit, et similia perpetraverit.’
 ‘Crimen vel poena paterna nullam maculam filio infligere
 ‘potest.’ ‘Igni ⁴ concremantur qui saluti dominorum suorum
 ‘insidiaverint.’ ‘Facta puniuntur, ut furta, homicidia.
 ‘scripta, ut falsa et libelli famosi. consilia, ut coniura-
 ‘tiones. sed haec quatuor genera consideranda sunt septem
 ‘modis, causa, persona, loco, tempore, qualitate, quantitate
 ‘et eventu. causa, ut in verberibus, quae impunita sunt a
 ‘magistro vel parente, nisi modum excedant, quia emenda-
 ‘tionis et non iniuriae gratia videntur adhiberi, et puniun-
 ‘tur, cum quis per iram ab extraneo ⁵ pulsatus est. persona
 ‘dupliciter spectatur, eius scilicet qui fecit, et eius qui
 ‘passus est: aliter enim puniuntur ex eisdem factionibus
 ‘servi quam liberi, et aliter qui quid ⁶ in dominum paren-
 ‘temve commiserit quam in extraneum, in magistratum
 ‘quam privatum. et similiter aetatis ratio habenda est.
 ‘locus facit ut idem sit furtum vel sacrilegium, et secundum
 ‘hoc minor poena vel maior. tempus discernit praedonem
 ‘a fure, vel effractorem, et furem diurnum a nocturno.
 ‘quantitas discernit furem ab abigeo, ⁷ secundum quod fur-

¹ Supply *poenae* from Digest.

² Dig. Corb. Cr. Ed. Reg.; omit *homines* Vulg.

³ Dig. Corb. Cr. Ed. Reg.; *leniores* Vulg.

⁴ *igne* Ed. Vulg.

⁵ Omit *ab extraneo* Cr. ⁶ *qui quidem aliquid* Vulg. ⁷ *abigeo* Vulg.

'tum fuerit maius vel minus, ut si quis suem surripuerit, fur erit, et si quis gregem, abigeus erit. eventus' ut si ex voluntate et conscientia certa fecerit quis aliquid, sicut homicidium, an ex eventu, ut supra : et secundum hoc, aut erit felonia aut infortunium. Item est poena pecuniaria, sicut corporalis : et quaelibet poena corporalis, quamvis minima, maior est qualibet poena pecuniaria.

NOTES.

A great deal of this chapter is taken from the Digest, but is suggested by Azo's dissertation on punishments in *C. de poenis* (9. 47). The following extract will show the correspondence.

Perpensa autem qualitate delicti imponuntur poenae. quarum septem genera, tria sunt capitalia, quattuor non capitalia. Capitalia ut si caput gladio amputetur, non securi vel falce, vel fureis suspendatur, vel vivus concremetur, vel unguis bestiarum ferarum latera sulcentur, vel bestiis deiciatur, non ut lapidetur, vel crucifigatur, vel de ponte vel de monte iactetur, ut ff. eo. l. *aut damnum § vita* et l. *si divortio*¹ § non et l. *capitalium* in prin. et § *famosos*, et l. *si quis aliquid* § i. et ii., et supra, *de malefi. et mathema.* l. *et si excepta* [D. 48. 19. 8. § 1; D. 48. 19. 25. § 1; D. 48. 19. 28 pr. et § 15; D. 48. 19. 38. §§ 1. 2; C. 9. 18. 7]. Et est proxima mortis poena metalli coertio quae adimit libertatem et civitatem. . . . Et est alia poena capitalis ut deportatio et in opus publicum, non dico metalli, damnatio. . . . Non capitalis poena est, ut relegatio ad tempus et in perpetuum facta, nec adimit bona. Infamia est dignitatis amissio vel ad dignitatem seu officium vel forum interdicta aspiratio. . . . Fertur sententia in delinquentem, non in heredem eius, vel in notos vel in propinquos, quia peccata suos debent tenere auctores. in crimine tamen laesae maiestatis in multis gravantur filii ex delicto patris, ut ff. eo. l. *si poena*, et l. *crimen*, et inf. eo. l. *sancimus*, et sup. *ad l. iul. ma.* l. penult. [D. 48. 19. 20 et 26; C. 9. 47. 22; C. 9. 8. 5]. Et si quidem certum sit iudici quam debeat imponere poenam, imponet illam . . . ubi autem res est dubia proclivior in lenitate debet esse iudex. nam interpretatione legum poenae molliendae sunt potius quam exasperandae. . . . Est ergo respiciendum iudicanti, id est, 'ne quid aut durius aut remissius constitatur quam causa deposcit. nec enim aut severitatis aut clementiae gloria affectanda est, sed perpenso iudicio prout quaeque res postulat statuendum est. Plane in levioribus causis procliviores ad lenitatem debent esse iudices, in gravioribus severitatem legum eum aliquo temperamento benignitatis subsequi,' ut ff. eo. l. *respiciendum* [D. 48.

¹ Corr. *si diutino*.

19.11 pr.]. nec audiendae sunt vanae¹ voces populi, aut vocibus eorum eredi oportet quando aut obnoxium eriminum absolvi aut innocentem condemnari desiderant, ut inf. e. *decurionum* [C. 9. 47. 12].

Bracton, however, does not seem to be altogether dependent on Azo; apparently he has followed some of Azo's references into the Digest. Thus when he says, 'ut si gladio animadverti debeat in aliquem, tunc non securi nec telo neque fustibus vel laqueo alio quove modo,' he is repeating almost exactly words of Ulpian which are given in D. 48. 19. 8. § 1: 'sed animadverti gladio oportet, non securi vel telo vel fuste vel laqueo vel quo alio modo.' And he continues to follow Ulpian (§ 3): 'Nec ea quidem poena damnari quem oportet ut verberibus necetur, vel virgis interematur, nec tormentis: quamvis plerique dum torquentur deficere solent.' Then there follows immediately another extract from Ulpian, who has said (§ 9): 'Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. nam huiusmodi poenae interdictae sunt. career enim ad continendos homines, non ad puniendos haberi debet.' Then follows a piece from Marcianus [e. t. l. 11 pr.] which Azo has copied, 'Respiciendum² est iudicanti . . . benignitatis subsequi.' And then we have another extract from Marcianus [e. t. l. 11. § 2] which Bracton has spoilt by the omission of its first words. It should run thus: 'Delinquitur autem aut proposito, aut impetu, aut casu: proposito delinquant latrones qui factionem habent: impetu autem, cum per ebrietatem ad manus aut ad ferrum venit: casu vero, cum in venando telum in feram missum hominem interfecit.' Then Bracton takes a passage from Callistratus [e. t. l. 26]: 'Crimen vel poena paterna nullam maculam filio infligere potest.' Then a little piece from the same author [e. t. l. 28. § 11]: 'Igni cremantur plerumque servi qui saluti dominorum suorum insidiaverint, nonnunquam etiam liberi plebei et humiles personae.' This in Bracton's text becomes simpler, 'Igni concremantur qui saluti dominorum suorum insidiaverint.' Then follows a long passage from Claudius Saturninus [e. t. l. 16]. This Azo has abstracted. Bracton, however, has gone to the original, which runs thus: 'Aut facta puniuntur, ut furta caedesque, aut dicta, ut convicia et infidae advocaciones, aut scripta, ut falsa et famosi libelli, aut consilia, ut coniurationes et latronum conscientia quosque alios suadendo iuvisse sceleris est instar. Sed haec quattuor genera consideranda sunt septem modis: causa, persona, loco, tempore, qualitate, quantitate, eventu. Causa, ut in verberibus, quae impunita sunt a magistro allata vel parente, quoniam emendationis non iniuriae gratia videntur adhiberi; puniuntur cum quis per iram ab extraneo pulsatus est. Persona dupliciter spectatur, eius qui fecit, et eius qui passus est: aliter enim puniuntur ex isdem facinoribus servi quam liberi, et aliter qui quid in dominum parentemve ausus est quam qui in extraneum, in magistratum vel in privatum. in eius rei consideratione aetatis quoque ratio habeatur. Locus facit ut idem vel furtum vel sacrile-

¹ *variae* Sp.

² *Perspiciendum* is now the received reading.

'gium sit *et capite lucendum* vel minore supplicio. Tempus discernit
'*emansorem a fugitivo*, et effractorem vel furem diurnum a nocturno.
'*Qualitate, cum factum vel atrocius vel levius est, ut furta manifesta*
'*a nec manifestis discerni solent, rixae a grassaturis, expilationes a*
'*furtis, petulantia a violentia.* . . Quantitas discernit furem ab abigeo :
'nam qui unum suum surripuerit ut fur coerebitur, qui gregem ut abi-
'geus. Eventus spectetur, *ut a clementissimo quoquo facta : quam-*
'*quam lex non minus eum, qui occidendi hominis causa eum telo*
'*fuerit, quam eum qui occiderit puniat.*' The passages which Braeton
rejects or modifies are here printed in italics. Apparently he has omitted
to give any examples of the influence of *qualitas* ; this omission may
be due to a copyist whose eye was caught by *quantitas* at the beginning
of the next sentence. The refusal to say that spoken words may con-
stitute a crime is worthy of note. On the whole, this section is a
cento of passages from the Digest, and Braeton seems, with some aid
from Azo, to have gone to the Digest for them.

When Braeton speaks of men who have been condemned to death
being subjected to *t tormenta* before they die, he is probably thinking
of the painful prolongation of the traitor's sufferings.

[III. 7. § 1.] Dictum est superius, in cuius curia actiones [f. 105]
criminales debeant terminari, sive in comitatu vel extra,
sive in curia domini regis vel alibi. nunc autem dicendum
ubi terminandae¹ sunt actiones civiles, quae sunt in rem
vel in personam. Et sciendum quod earum quae sunt in
rem, sicut rei vindicationes per breve de recto, terminari
debent in curia baronum vel aliorum, de quibus ipse petens
clamaverit tenere, si plenum rectum ei tenere voluerit, vel
possit vel sciverit. si autem noluerit vel non possit vel
nesciverit, tunc probato a tenente quod curia domini sui ei
de recto defecerit, transferri debet placitum ad comitatum,
ut vicecomes rectum teneat, et sic a comitatu transferri possit
ad magnam curiam, ex certa causa, si dominus rex voluerit, [f. 105 b]
et ibi terminari. sed² fieri non debet³ contra voluntatem
dominorum, sicut olim fieri solet per *praecepe*⁴ nisi ex
praedictis causis, vel si dominus curiae sponte curiam suam
remiserit ipsi regi. Et de hac materia habetis plenius

¹ Dig. Corb. Cr. Ed. Reg. ; *triandae* Vulg.

² Insert *hoc* Vulg.

³ *debent* Dig.

⁴ Dig. Corb. Cr. Ed. Reg. ; *principem* Vulg. (!).

infra, de actionibus civilibus in rem super ipsa proprietate per breve de recto. In comitatu vero terminari poterit placitum per breve de recto et coram vicecomite, si ad magnam curiam¹ translatum non fuerit ut praedictum est. Item quaestio² status, sicut placitum de nativis, nisi ille qui petitur excipiendo se dicat esse liberum, et coram iustitiariis domini regis in adventu ipsorum se esse probaturum. et quo casu, pacem habebit usque³ adventum ipsorum, vel transferri poterit probatio et iudicium ad magnam curiam, si domino regi placuerit. Item in comitatu et coram vicecomite placitari possunt plura placita, in quibus vicecomes est iustitiarius constitutus per breve quod iustitiet, sicut de servitiis et consuetudinibus, de debitis et aliis placitis infinitis. Item placitum de vetito namii, in quo vicecomes iustitiarius est et vicecomes. et qualiter huiusmodi terminentur inferius dicetur. Et quare non potest vicecomes et comitatus⁴ iudicare de alicuius libertate, sicut de ipsius nativitate, cum probatio libertatis sit quasi incidens placito de nativis, sicut posset in curia domini regis? nescio aliam causam assignare, nisi hoc sit propter favorem libertatis, quae est res inaestimabilis, et quae insipientibus et minus discretis committi non debet ad⁵ discrimen.

[III. 7. § 2.] Placita vero civilia in rem et in personam in curia domini regis terminanda coram diversis iustitiariis terminantur. Habet enim plures curias:⁶ curiam propriam, sicut aulam regiam, et iustitiarios capitales qui proprias causas regis terminant et aliorum omnium per querelam vel per privilegium sive libertatem: ut si sit aliquis qui implacitari non debeat nisi coram ipso domino rege. habet etiam curiam et iustitiarios in banco residentes, qui cognoscunt de omnibus placitis, de quibus auctoritatem habent cognoscendi, et sine waranto iurisdictionem non

¹ Dig. Cr. Reg.; insert *domini regis* Vulg.

² Item quod Dig.

³ Insert *ad* Vulg.

⁴ Dig. Corb. Cr. Ed. Reg.; *vicecomes in comitatu* Vulg.

⁵ Dig. Corb. Cr. Ed. Reg.; *propter* Vulg.

⁶ Insert *in quibus diversae actiones terminantur, et illarum curiarum habet unam* Vulg.; omit Dig. Corb. Cr. Ed. Reg.

habent, neque coercionem. Habet etiam iustituarios itinerantes de comitatu in comitatum, quandoque ad omnia placita, quandoque ad quaedam specialia, sicut assisas novae disseisinae et mortis antecessoris capiendas, et ad gaolas deliberandas, quandoque ad unicam vel duas et non plures: in his casibus omnibus erit curia¹ domini regis. Et sunt duae recognitiones, scilicet, de nova disseisina et de morte antecessoris, quae capi non debent nisi in suis comitatibus per communem libertatem, et hoc nisi inceptae fuerint in comitatibus, quia si inceptae fuerint in comitatu, extra comitatum transferri poterunt de loco in locum et extra comitatum terminari cum omnibus sequelis suis, sicut convictionibus et certificationibus, cum evenerint. et sive huiusmodi recognitiones in comitatu terminatae fuerint sive non, non est prohibitum quin convictiones et certificationes extra comitatum trahi possint. Et, sicut praedictum est in parte, trahuntur placita causis supradictis a curiis baronum usque ad comitatum et ibi terminantur quandoque et quandoque inde transferuntur, et ponuntur coram iustitiariis itinerantibus in comitatu, et inde coram iustitiariis de banco vel coram rege multis de causis.

[III. 7. § 3.] Sunt etiam inter alia placita, quaedam quae non per translationem, sed immediate terminari debent coram iustitiariis vel coram rege, scilicet placita² de baroniis, ubi ipse petens tenere clamat immediate de domino rege in capite per breve de recto, quod vocatur *praecipe in capite*, et hoc ideo, quia hoc³ tangit ipsum regem in toto, vel in parte. Item immediate in curia domini regis terminari debent placita de advocationibus ecclesiarum et⁴ capellarum, et assisae⁵ ultimae praesentationis: et est ratio, quia si alius a rege mandaret episcopis de admittendo clericum, et ipse non obtemperaret, alius a rege coercionem non haberet, et quia episcopus ad alterius mandatum, quam regis, clericum admittere non tenetur. Item immediate in curia domini regis placitantur placita de dotibus, ubi mulier nihil habet: et est ratio, quia si

¹ *erunt curiae ipsius* Vulg.

² Dig. Cr. Ed.; *placitum* Vulg.

³ Dig. Ed.; *hic* Vulg.

⁴ Dig. Ed. Reg.; *vel* Vulg.

⁵ *assisis* Vulg.

contra mulierem dotem petentem exciperetur quod dotem habere non posset, eo quod viro, cuius nomine dotem petit, nunquam fuit legitimo matrimonio copulata, nullus alius praeter regem posset episcopo demandare inquisitionem faciendam. Item immediate pertinet ad regem querela finis facti in curia domini regis et non observati: et est ratio, quia nemo potest finem interpretari, nisi ipse rex, in cuius curia fines fiunt. est enim eius interpretari cuius est concedere.¹ Item in curia domini regis immediate placitantur plura placita propter impotentiam aliorum ex necessitate, cum non possit aliquis baro, vicecomes vel alius de liberis tenementis cognoscere, nec tenens tenetur respondere, sine waranto vel praecepto domini regis, nec etiam possunt aliquem de huiusmodi ad sacramentum sine waranto compellere. et huiusmodi placita sunt infinita. Qualiter autem placita de curia in curiam transferuntur propter necessitatem multipliciter, vel propter indulgentiam privilegiatorum, sicut Templariorum et huiusmodi, infra dicetur plenius per translationem² per pone.

NOTES.

These are thoroughly English paragraphs. Bracton has turned aside from Azo and the Institutes, and is writing fluently of real law. Observe our improvement of the Vulgate text (p. 191) where it gives *per principem* instead of *per praecepe*. The allusion is to a section of Magna Carta, 1215, c. 34:—‘Breve quod vocatur *praecepe* de cetero ‘non fiat unde liber homo amittere possit curiam suam.’ An action *de nativo habendo* may be prosecuted in the county court; but if the defendant obtains a writ *de libertate probanda*, then the coming of the king’s justices must be awaited. Bracton can give no reason for this rule, except that it favours liberty. The dictum ‘*Libertas inaestinabilis*’ ‘res est’ is due to Paulus: D. 50. 17. 106.

According to Magna Carta, 1215, (*per communem libertatem*) c. 18. the recognitions of novel disseisin and mort d’ancestor are to be taken in their own counties. Bracton (p. 193) says, however, that if once an assize has been begun in its own county, it may be transferred outside the county from place to place with all its consequential proceedings (*cum omnibus sequelis suis*), such as attaints and certifications. There is much evidence on the plea rolls that this was freely done, and

¹ *condere* Cr. Ed. Reg.

² *de translatione* would be acceptable.

that the assize jurors were often compelled to journey from county to county, and to appear at Westminster.

There are privileged persons (*privilegiati*), in particular the Templars and Hospitallers, who can be sued in no court but the king's. In the twelfth century a good many of the rich religious houses obtained a charter declaring that they were not to be impleaded *nisi coram ipso domino Rege vel capitali iustitiario eius*. A *pone* (p. 194), so called from its cardinal word, is a writ for removing a cause from the county court to the king's court. Bracton's promise to speak of it is fulfilled on f. 332.

[III. 8 § 1.] Videndum etiam ubi et coram quibus [f. 106] personis proponendae sint actiones et probandae, et sciendum quod in iudicio. Videndum est igitur quid sit iudicium. [§ 2.] et sciendum quod iudicium est in qualibet actione trinus actus trium personarum: iudicis, videlicet, actoris et rei, secundum quod large accipi possunt huiusmodi personae, scilicet quod duae sint personae ad minus, inter quas vertatur contentio, et tertia persona ad minus quae¹ iudicet. alioquin non erit iudicium, cum istae personae sint partes principales in iudicio, sine quibus iudicium consistere non potest. Iudex vero sive iustitiarius uti debet veritate, et veritas iudicii in tribus consistit, scilicet, in indifferenti et aequali partium² susceptione, ut legitur in Deuteronomio primo: ³ Audite illos, et quod iustum fuerit, iudicate, sive civis sit iste, sive peregrinus. nulla erit distantia personarum, ita parvum audietis ut magnum, nec accipietis cuiusquam personam, quia dei iudicium est. Item in eodem libro cap. xvjº: Non accipies personam, nec munera, quia munera excaecant etc. ut infra de iustitiariis. Item consistit in diligenti examinatione, quia oportet iudicem cuncta rimari. Hoc intellegens Iob, ait xxº ixº: Causam, [f. 106 b] quam ignorabam, diligentissime investigabam. Non enim dicit diligenter vel diligentius, immo diligentissime. Debet enim iudex per examinationem de dubiis facere certum, et de credulitate veritatem, de ignorantia notitiam, et notorium sive notitiam de ignoto. Item consistit veritas

¹ qui Vulg.

² Dig. Cr. Ed. Reg.; *personarum* Vulg.

³ Dig. Cr. Reg.; omit *primo* Vulg.

iudicii in iusta sententiae prolatione et iusta et diligenti executione, ut in Deuteronomio xvj^o : Iuste quod iustum est persequeris, ut vivas et possideas terram quam dominus deus daturus est tibi. Et in ¹ secundo libro Paralipomenon xix^o ubi dicitur : Videte quid faciatis, non enim hominis exercetis iudicium sed dei, et illud idem quod iudicaveritis, in vos redundabit : sit timor domini vobiscum, et cum diligentia cuncta facite. non enim est apud dominum deum nostrum ² iniquitas, nec personarum acceptio, nec cupido munerum quae excaecant oculos sapientum, et pervertunt verba iustorum, ut legitur in Ecclesiastico xx^o j^o ³ : [§ 3] Exenia ⁴ et dona excaecant oculos iudicum. et qui dona sive ⁵ munera dixit, omne genus muneris intellexit. munus, scilicet a manu, quale scilicet ⁶ est res corporalis quae praestatur. munus a lingua, quale est blandiens et adulatoria supplicatio, laudum celebre praeconium, vanae gloriae symphonia. item munus ab obsequio, quale est servitium impensum et acceptum, pro quo extorquetur iudicii rectitudo. item nec minus ⁷ munus a sanguine vocari meretur, cum pro sanguinis linea recti iudicii linea recurvatur. in hoc enim tangit sanguis sanguinem. Haec ⁸ profecto genera munerum sordidorum nomine nuncupantur, et lex humana gravem poenam infligit iudici corrupto per sordes, id est per munera sordida, ut ⁹ si iudex vel iustitiarius paciscatur cum litigatore ad certam partem litis, ut C. *ad legem Iul. repet.* ¹⁰ l. omnes [C. 9. 27. 3], ubi dicitur : Omnes cognitores et iudices a pecuniis ¹¹ manus abstineant, nec alienum iurgium putent suam praedam. etenim privatarum quoque litium cognitor idemque mercator statutam legibus cogetur subire iacturam. Iactura enim sive poena erit, quod id, ¹² quod recepit, restituat in quadruplum, ut C. e. l. ult. [C. 9. 27. 6] in fine, quia ibi tenentur in quadruplum, sive tempore administrationis aliquid receperint sive post, quocumque titulo vel quocumque velamento, ut si

¹ Omit in Vulg.

² *vestrum* Vulg.

³ 20 Vulg.

⁴ *Exenia* Dig. Corb. Cr. Reg.

⁵ Dig. Corb. Cr. Reg. ; *et* Vulg.

⁶ Omit *scilicet* Vulg.

⁷ *munus* Vulg.

⁸ *Hoc* Dig.

⁹ Dig. Corb. Cr. Ed. Reg. ; *ubi* Vulg.

¹⁰ *legem vel repetet* Vulg. (!)

¹¹ Dig. Corb. Cr. Ed. Reg. ; *a re cuius* Vulg.

¹² *idem* Vulg.

finxerit intervenisse titulum donationis vel venditionis. Revera sordidus est ille quem iudicii veritas non adornat, ut si favor vel odium, timor, invidia vel praemium inducant contrarium, ut iudicii veritas corruat in plateis, de quo dici poterit: Vae illi sordido, per quem veritas sordescit in paludibus platearum. nec erit inter beatos connumerandus. de quibus dicitur: Beatus qui excutit manus suas ab omni munere. Ab omni tamen munere non est abstinendum, quia licet ab omnibus et passim avarissimum sit accipere et vilissimum, a nemine tamen accipere¹ erit inhumanum, ut si amicus recipiat² ab amico solo intuitu amicitiae et amoris.

NOTES.

Bracton begins this section by borrowing a sentence from Azo's Summa of the Code *de iudiciis* (3. 1). Azo lays out his subject-matter thus:—'Videamus igitur quid sit iudicium, et quae sint necessaria in eius constitutione, et qualiter, et quando ad effectum productur, quis sit eius effectus in principio et in fine et in medio. . . . 'Iudicium est legitimus actus trium personarum, scilicet, iudicis, actoris et rei.' Then, however, Bracton turns aside to preach a sermon against corrupt and negligent judges. This consists of a string of texts from the Bible. Deut. 1. 16: 'Audite illos . . . quia dei iudicium est.' Deut. 16. 19: 'Non accipies personam nec munera, quia munera excaecant oculos sapientum et mutant verba iustorum.' Job 29. 16: 'Causam quam nesciebam diligentissime investigabam.' Deut. 16. 20: 'Iuste quod iustum . . . deus dederit tibi.' Paralip. ii. 19. 6: 'Videte quid faciatis . . . cupido munerum.' Ecclesiasticus 20. 31: 'Xenia et dona excaecant oculos iudicum.' These texts having been transcribed, Bracton seems to turn to the Decretum, in order that he may take thence, or rather paraphrase, some words of St. Gregory (c. 114, C. 1. qu. 1):—'Unde bene, eum virum iustum Propheta describeret, ait: Qui excutit manus suas ab omni munere. 'Non enim dixit solum a munere, sed ab omni munere, quia aliud est munus ab obsequio, aliud a manu, aliud a lingua. Munus ab obsequio est servitus indebite impensa. Munus a manu pecunia est, Munus a lingua favor.' When Bracton adds 'Munus a sanguine,' he seems to mean that a judge is corrupted *munere* when kinship to one of the parties gives a bias to his judgment. For the punishment of the corrupt judge we turn to the civil law. Apparently Bracton has gone for his Roman matter, not to Azo, but to the Code, which he here cites in formal fashion. His first reference is to C. 9. 27, 3:—'Omnes

¹ accipere Dig. Cr. Reg; omit Vulg.

² accipiat Vulg.

‘cognitores et iudices a pecuniis atque patrimoniis manus abstineant, neque alienum iurgium putent suam praedam. etenim privatarum quoque litium cognitor idemque mercator statutam legibus cogetur subire iacturam.’ For the punishment *in quadruplum* he refers to C. 9. 27. 6:—‘. . . quadrupli poena eo, qui convictus fuerit, modo omnibus feriendo.’ We then have some more biblical phrases, which probably form part of some sermon. Isaiah 59. 14: ‘quia corruit in platea veritas et aequitas non potuit ingredi.’ Isaiah 33. 15: ‘et executit manus suas ab omni munere.’ The concluding remark to the effect that some gifts may be taken may also come from some canonical source.

[f. 106 b]

[III. 8. § 3 cont.] Actor vero, sive sit petens sive querens, uti debet intentione. docere enim debet et rationem praetendere quod ad ipsum pertineat actio et quod pars esse possit in iudicio. proponere enim debet in iudicio¹ coram eo, qui ius dicturus est, intentionem suam, et illam fundare et probare. Reus vero uti debet exceptione et defensione, secundum quod inferius dicetur plenius. [§ 4.] Oportet etiam quod ille qui iudicat, ad hoc quod rata sint iudicia, habeat iurisdictionem ordinariam vel delegatam. et non sufficit quod iurisdictionem habeat, nisi habeat coercionem, quod si iudicium suum executioni demandare non posset, sic essent iudicia delusoria. Non enim habet ordinarius iurisdictionem et executionem in omni causa, cum iura sint separata et limitata. [§ 5.] Sunt enim causae spirituales, in quibus iudex secularis non habet cognitionem nec executionem, cum non habeat coercionem. in his enim causis pertinet cognitio ad iudices ecclesiasticos, qui regunt et defendunt sacerdotium. Sunt autem causae seculares quarum cognitio pertinet ad reges et principes, qui defendunt regnum, et de quibus iudices ecclesiastici se intromittere non debent, cum eorum iura sive iurisdictiones limitatae sint et separatae, nisi ita sit quod gladius iuvare debeat gladium. Est enim magna differentia inter sacerdotium et regnum.

¹ Dig. Corb. Cr. Ed. Reg.; omit *in iudicio* Vulg.

NOTES.

It will be remembered that Bracton has started from the Azonian account of a *iudicium*. In every *iudicium* three persons are concerned, *iudex*, *actor*, *reus*. He means to state briefly the duties of these three persons, but when dealing with the *iudex* he is led away into his sermon against corruption. He now turns to the demandant or plaintiff and the defendant, whom he dismisses with a few words. The plaintiff (*querens*) or demandant (*petens*) must show by his count (*intentio*) that he has a cause of action, and the defendant must protect himself by a defence or an *exceptio* as will be more fully stated below.

Azo's commentary on the Codo *de iudiciis* (3. 1), at which Bracton has been looking, mentions the two kinds of *iudices*, the *ordinarii* and the *delegati*. This distinction would be familiar to anyone who knew anything of the ecclesiastical courts. Bracton adopts it and then turns to notice the division of the spiritual from the temporal jurisdiction.

The oldest MSS. seem to show that Bracton considered this to be the end of one grand division, the first book, of his treatise, a book corresponding to the Institutes of Justinian. He has run through the Institutes, taken them as his guide, and borrowed from them all that seemed useful. He has spoken of persons, of things, and of actions. The remainder of his treatise will indeed be devoted to actions, but he has now won his way to safe English ground, and in his arrangement of topics he will no longer be guided by the Roman text-book. His recent mention of the spiritual jurisdiction gives him a good opportunity of beginning a new book:—Since we have no concern with spiritual causes, we will turn to the temporal jurisdiction. Nevertheless, there is a close connexion between his second book and his first. He has been brought to the question 'Who is *iudex*?' or 'Who has jurisdiction?' and now, so far as temporal causes are concerned, he proceeds to answer it.

From this point onwards until he begins his account of the criminal procedure before justices in eyre, he is concerned with the question of jurisdiction; and though he ever and anon borrows a phrase or a maxim from Azo, he does not seem to have any one portion of the civilian's book constantly before him. He explains in the first place that the king is the *iudex ordinarius* for the whole realm, and in a brief dissertation on the nature of the kingship he introduces and playfully or wilfully distorts the 'sed et quod principi placuit' with which Glanvill had already trifled. Then the king's justices appear as *iudices delegati*. The various kinds of justices are described, and the commissions which appoint them are set out at full length. This naturally brings us to the eyre and its criminal business, but first we have a short discourse on the order of actions, which deserves to be

printed here, since the marginal notes upon it contain some learned romanesque work.

We are omitting from 'Cum autem de regimine sacerdotii' on f. 107 to 'Et quoniam quandoque competit uni actio' on f. 112.

[f. 112] [III. 12. § 2.] Et cum ¹ quandoque competit actio unica contra unum, quandoque plures contra unum vel contra plures, qui tenent in communi vel separatim et per se, quandoque competunt plures actiones vel una pluribus qui tenent in communi contra unum vel plures, quarum quaedam sunt praeiudiciales, eo quod primo debent terminari, secundum quod sunt criminales vel civiles, et si omnes criminales, tunc una maior et altera minor, vel si una criminalis et alia civilis, vel si omnes civiles, in rem vel in personam, et si in rem, vel super possessione vel super proprietate, ideo de ordine actionum et iudiciorum, et quae actio debeat alteri praeferri.

[f. 112 b]

[§ 3.] Et inprimis sciendum, quod si alicui plures competant actiones criminales contra unum vel plures, illa quae maior est primo debet terminari, ne maleficia remaneant impunita et extinguatur poena, ut si de minori crimine prius ageretur, sic, extincta persona criminosi, extingueretur poena in maiori: sicut videri poterit, ut si quis accusatus fuerit de furti crimine vel homicidii et similiter de crimine laesae maiestatis, et convictus, gravius punitur crimen laesae maiestatis quam crimen furti vel homicidii, quia ex uno sequitur quod criminis trahitur, frangitur et suspenditur, ex alio non sequitur nisi tantum suspensio. et ideo si de minori crimine prius ageretur, ita extingueretur poena in maiori pro parte, scilicet, quod non traheretur nec frangeretur, quod esse non debet. Si autem duae vel plures competant actiones contra unum, quarum una criminalis sit et altera civilis, criminalis prius debet terminari. et est ratio, quia si quis appellatus est de vita et membris, competit ei exceptio contra quemlibet agentem civiliter, quod appellatus ei respondere non tenetur antequam se defenderit in criminali, nec mutare poterit statum suum quamdiu dubius

¹ quoniam Vulg.

fuerit status propter crimen. Si autem contra unum duae competant actiones civiles, quarum una in personam et alia in rem, utraque simul poterit intentari, quia neutra aliam tollit vel excludit, ex quo sese inter easdem personas compatiuntur, ac si unus illas intentaret contra plures. Si autem utraque fuerit in rem, et utraque super possessione,¹ illa quae fuerit super possessione propria prius terminari debet, sicut in ² assisa novae disseisinae, quam illa quae fuerit super possessione aliena, sicut assisa mortis antecessoris de morte alicuius antecessoris. Si autem plures petierint seisinam propriam versus unum per assisam novae disseisinae, ultima seisisina prius erit terminanda.³ et sic fiat de pluribus quod de duobus. et illud idem fiat de assisis ⁴ mortis antecessoris, si plures petant versus unum per assisam. Si autem uni competant plures actiones civiles versus unum, tam super possessione propria et aliena quam super proprietate, petens habet electionem, quam primo voluerit intentare, et una electa, ad alias regressum non habebit pendente illa, si processerit secundum ordinem actionum. et si ordine non servato processerit, ad alias ⁵ postmodum regressum non habebit. et unde si plures competant actiones adversus unum, sicut assisa novae disseisinae de possessione propria, et assisa de seisisina ⁶ antecessoris, et breve de ingressu, et breve de recto, primo (si velit ordinem servare, quod una terminata possit ⁷ ad alias habere regressum ⁸) primo ⁹ eligat actiones super possessione, et illam ¹⁰ primo de seisisina propria, et postea de seisisina aliena, et tunc demum agat de proprietate, et primo eligat actionem de ingressu, et postea super ipso ¹¹ recto. quia si primo elegerit agere super ipso recto, nunquam postmodum regressum habebit ad inferiores, nisi ita sit quod aliquando per narrationem vertatur ¹² breve de recto in breve de ingressu. quia quamvis teneat ordo, ut praedictum est, de actione in actionem ascendendo usque ad [f. 113]

¹ Omit *et utraque super possessione* Dig.² Omit *in* Reg.³ *determinanda* Vulg.⁴ Dig. Reg.; *assisa* Ed. Vulg.⁵ Dig. Corb. Ed. Reg.; *illas* Vulg.⁶ Ed. Vulg.; *desseisina* Dig.⁷ *possit* repeated Dig.⁸ *regressum* Dig. Ed. Reg.; *ingressum* Vulg.⁹ Dig. Ed. Reg.; omit *primo* Vulg.¹⁰ *illa* Dig.¹¹ *eo* Dig.¹² Dig. Ed. Reg.; *revertatur* Vulg.

breve de recto, nunquam tenebit ordo descendendo a superiore actione ad inferiorem.

[III. 12. § 4.] Et quod de possessione prius agendum sit quam de proprietate, et quod causa possessionis est praemittenda, quavis in fine debeat proprietas praevalere, videri poterit manifeste. quia esto quod iustitarii prius de proprietate et de recto pronuntient¹ quam de possessione inter aliquos, si postea de possessione cognoscere voluerint inter eosdem, nihil agunt.² quia placitum de recto, quod praecessit inter eosdem de eodem tenemento recognitionem de petendo³ seisinam propriam vel alienam de eodem tenemento extinguit inter eosdem. quia placitum de recto utrumque ius determinat, tam possessionis quam proprietatis. ut de termino S. Trinitatis anno regni regis H. tertio, in comitatu Eboraci, assisa mortis antecessoris⁴ *si Willelmus le Seneschal*. Et idem erit si duo implacitaverint unum, unus videlicet per recognitionem in causa possessionis, et alius per breve de recto in causa proprietatis, suspenditur placitum per breve de recto, donec sciatur cui debeat possessio remanere, ubicumque fuerit placitum de recto, in curia domini regis vel in comitatu. et si possessio per recognitionem tenenti remanserit,⁵ tunc demum procedat placitum de recto inter eos. si autem tenens amiserit per recognitionem,⁶ tunc cadit breve de recto, et tunc agat petens versus eum qui evicit per recognitionem. sed cum prosecutio per breve de recto ita suspensa sit per recognitionem, petens per breve de recto semper apponet⁷ clamium suum, pro quocumque feratur sententia in causa possessionis. Et quod prius cognoscendum sit de possessione quam de proprietate si violentia adhibita sit, probatur ff. *ad l. iul. de vi. pu. l. si de vi* [D. 48. 6. 5. § 1], ubi dicitur quod si de vi et possessione vel dominio quaeratur, ante cognoscendum est de vi quam de proprietate rei, et etiam prius quaeritur⁸ de vi quam de iure domini sive possessionis. Item est et alia ratio, quod qui rem petere voluerit, si caute sibi provi-

¹ *iustitarius . . . pronuntiet* Vulg.

² Dig. Ed. Reg.; *ageret* Vulg. ³ *petenda* Dig. ⁴ Omit *antecessoris* Dig.

⁵⁻⁶ Omit Dig.

⁷ *apponit* Vulg.; *apponet* Dig. Ed. Reg

⁸ *Corr. quaeratur.*

derit, videat primo an aliqua ratione nancisci possit possessionem, cum¹ commodius est possidere quam petere. multi enim sunt qui si possessionem habuerint, se defendere poterunt per exceptionem : si autem fuerint extra, vix aut nunquam forte recuperabunt per actionem. De hoc autem quod dicitur, quod qui primo petierit² per breve de recto, quod ad inferiores actiones descendere non possit, videndum qualiter usus fuerit brevi de recto. Sunt quidam [ff. 113 b] qui dicunt quod si in tantum usus fuit petens per breve de recto quod tenens summonitus sit,³ et ad summonitionem essoniatus, quod hoc sufficit quod regressum non habeat ad actiones inferiores, quia tunc inceptum est placitum cum effectum per breve de recto. quidam autem dicunt contrarium, quod non est inceptum cum effectum antequam summonitus comparuerit et ad breve responderit vel warantum vocaverit vel ulterius processerit. sed re vera, sufficit⁴ si fiat ut primo dictum est. Et haec vera sunt si breve, per quod actio incepta est, teneat in suo casu. ut si assisa mortis antecessoris impetrata fuerit, et non iacuerit inter partes, pro non impetrata reputabitur, et ideo descendere poterit petens ad assisam novae disseisinae ad seisinam propriam recuperandam. eodem modo videtur quod esse debeat, si quis usus fuerit et impetraverit parvum breve de recto secundum consuetudinem manerii domini regis, ubi impetrasse debuit magnum breve patens. si eo utatur, nihilominus regressum habebit ad breve magnum ad petendum liberum tenementum,⁵ et e contrario : quia cum in suo casu non sit⁶ impetrata, ideo nulla. Si autem utraque actio duorum versus unum super proprietate, et ubi uterque agere poterit tam super possessione quam super proprietate, sed ratione diversorum temporum, semper de ultima seisina prius erit cognoscendum. et si de ultima seisina constare non possit, tunc observetur quod dicitur, quod qui prius appellat prius agat.⁷

Cum autem ab una parte plures actiones civiles propon-

¹ *quoniam* Vulg.

² *petierint* Vulg.

³ *fuerit* Reg.

⁴ Dig. Reg. Ed. ; *sufficiat* Vulg.

⁵ Dig. Reg. Ed. ; insert *suum* Vulg.

⁶ *sit* Ed. ; *fuit* Reg. ; *sunt* Vulg. : omit Dig.

⁷ Insert *quod fallit in quatuor casibus* Vulg. This, as Dig. shows, is a rubric for the next paragraph.

antur versus unum vel plures de pluribus rebus et diversis, poterit qui eas proponit quam voluerit praemittere¹ et omnes simul tractare. De hoc autem quod dicitur quod si plures alicui competant actiones, una debet experiri, et una electa ad alias non poterit recurrere pendente prima, sciendum est, quod istud fallit in quatuor casibus. Primus casus est quod cum quis plures habeat actiones vel duas de una re, quae fuerint contrariae, si utrasque proposuerit, audiri non debet non² magis quam si contraria allegaret. oportet igitur quod unam istarum proponat, quam voluerit, quia sese non compatiuntur nec simul stare possunt, quia una excludit aliam. ut si quis peteret simul sortem et usuras, et terram in dominico et ad terminum. Secundus casus est, ut si illa quae primo proponitur pendeat ex alia, et quae posterius proponi deberet per ordinem. ut si quis tanquam heres petat debitum hereditarium antequam se probaverit heredem, et postea vult inquiri si sit heres vel non. praepostera est enim talis petitio. item si quis petat fundum rei vindicatione, et statim vult percipere fructus vel colligere antequam fundum acquisiverit, vel de fructibus agere antequam prima actio terminetur de principali, repelli debet a secunda actione de fructibus. primo enim debet constare de re principali per actionem primam cuius esse debeat et postea de³ eius pertinentiis. et unde videtur rationibus praedictis quod si quis petat manerium cum pertinentiis, ad quod pertineat advocatio sicut de pertinentiis, et pendente placito de manerio, antequam convincatur cuius esse debeat, contingat ecclesiam vacare, et ille qui petit manerium, praesentaverit antequam principale terminetur, si placitare voluerit, non audietur per breve⁴ *quare impedit* nec de ultima praesentatione. et plures sunt huiusmodi actiones, et infinitae. Tertius casus est, cum secunda sit praeiudicialis primae, quod non est in primo casu, sed e converso. ut si a te petam fundum Titianum, quem tu possides et negas meum esse, et petam viam ad ipsum fundum Titianum per fundum Sempro-

[f. 114]

¹ *promittere* Dig.² Dig. Corb. Reg.; omit *non* Vulg.³ Omit *de* Dig. Ed. Reg.⁴ Insert *de* Vulg.

nianum, qui Titii est, non sum audiendus in hac secunda actione de via, quae praeiudicat primae,¹ quia primo oportet discutere cuius esse debeat fundus Titianus, ad quem via pertinere debeat. item si vindico a te aliquem fundum, et antequam convincatur velim interim agere tecum de communi dividundo, non sum audiendus pro eo, quia per² hanc actionem de dividundo praeiudicatur primae de principali recuperando. Quartus casus est, si tales sint actiones propositae, quod una tollitur electione alterius: ut si agam in causa proprietatis per breve de recto, et postea velim recurrere ad aliam quae sit de possessione, non possum, quia per hoc fieret praeiudicium primae, et cum³ utraque actio tam proprietatis quam possessionis sub actione de proprietate continetur.

NOTES.

The whole of this discussion seems to be suggested in a general way by Azo's Summa of the Code *de ordine iudiciorum* (3. 8); but there is only suggestion, and Bracon does not adopt Azo's results. For instance, according to Bracon, if one man has several causes of criminal action against another and one of these is 'greater' than the others, he must begin with the greater: thus, *e.g.* an accusation of treason has precedence of an accusation of theft or homicide. All this is otherwise in Azo: 'Si autem plures criminales accusationes simul 'proponere, potest, cum non sit prohibitus. si ex eodem facto, non 'videtur quod liceat.' As regards civil actions the picture that is before Bracon's mind of a graduated scale of actions ascending from the purely possessory novel disseisin to the purely proprietary writ of right, is of course thoroughly un-Roman, though the doctrine that the question of possession comes before the question of ownership is Roman; and Bracon may have referred to the Code, 3. 32. 13: 'Ordinarii iuris est, ut mancipiorum orta quaestione prius exhibitis 'mancipiis de possessione iudicetur, ac tunc demum proprietatis causa 'ab eodem iudice decidatur.' At any rate, having referred us to an English case, *Si Willielmus le Seneschal* (which will be found in the Note Book, pl. 37, and was decided in the year 1219), he expressly cites D. 48. 6. 5. § 1. [The citation ought to run, 'ut ff. ad legem 'Iuliam, l. qui coetu, § si de vi.'] 'Si de vi et possessione vel dominio

¹ Insert *et* Vulg. ² *super* Dig.; *pro eo quia* Ed.; *pro eo quod per* Reg. Vulg.
³ Dig. Ed. Reg.; *et tamen* Vulg.

'quaeratur, ante cognoscendum de vi quam de proprietate rei divus Pius
'τῷ κοινῷ τῶν Θεσσαλῶν Gracece rescripsit. sed et decrevit ut prius
'de vi quaeratur quam de iure dominii sive possessionis.' Then after
a sentence which lays stress on the beatitude of possession ('Multi
'enim sunt . . . per actionem'), Bracton discusses a practical English
question:—Up to what moment is it open to a demandant to with-
draw from a higher and begin a lower action? Can he do this after
the tenant has cast an essoin, but before the tenant has appeared and
pleaded?

Then Bracton approaches the case in which actions are brought
against *X* by two independent persons, *A* and *B*, each of whom claims
the land that *X* holds. Here his rule is that the action which is based
on the latest seisin has priority. If this rule cannot be applied, then
precedence must be given to the action that is first begun, 'qui prius
'appellat prius agat.' This last solution he obtains from Azo (C. 3. 8),
who cites D. 5. 1. 29, 'Qui appellat prior, agit.' Azo then proceeds to
say that this rule breaks down in four cases: 'Fallit autem hanc regula
'cum utraque querela est civilis et secunda praeiudicialis. . . . Item
'fallit cum secunda est criminalis et prima est civilis sed non praeiu-
'dicialis. . . . Item fallit cum utraque est criminalis, secunda maior.
'Item cum utraque est par, sed tamen accusatus vult proseguire suam
'iniuriam vel suorum.' Azo is thinking of cross-actions: *A* is suing
B and *B* is suing *A*.

Bracton then returns to the case in which *A* has several actions
against *B*; he states a rule and then states four exceptions to it—
'istud fallit in quattuor casibus.' His four exceptions are Azonian, but
the rule from which he starts is not Azo's rule. The passage in Azo's
Summa of the Code (3. 8) that Bracton has before him is this:—

'Cum quis alium vult convenire, offerre debet libellum in quo sua
'contineatur querela. Et si quidem una sit querela, non ibi est ordo
'spectandus. Si vero plures sunt quaestiones, aut omnes civiles, aut
'omnes criminales, aut mixtae. Si quidem sunt omnes civiles nomine
'diversarum rerum, potest omnes simul proponere nisi sint contrariae.
'ut ecce si velit agere furti quasi pecunia se invito contrectata et
'mandati quasi se volente¹ accepta, ut inf. *de furt.* l. i. [C. 6. 2. 1],
'vel vult agere ex vendito ad pretium, et² mandati vel simili actione
'de re vendita sibi retradenda, ut inf. *si servus ex. se. man. e.* l. i. et
'inf. *de pae. inter empt. et ven.* l. *commissorie* [C. 4. 36. 1; C. 4. 54. 4].
'vel nisi una pendeat ex altera: ut ecce quis tanquam heres petit
'debitum hereditarium et postea vult inquiri si sit heres an non. prae-
'postera enim est talis petitio, ut inf. *de hered. ae.* l. *ut debitum* [C. 4.
'16. 5]. vel nisi una sit alterius praeambula, ut cum vult agere de
'proprietate et possessione simul, ut inf. *de rei vin.* l. *ordinarii* [C. 3.
'32. 13]. vel nisi quaestiones civiles sint tales ut tollantur electione,
'ut dicitur in tributoria et quod iussu et de in rem verso et de
'pecunio et de petitione hereditatis ex uno testamento proponenda et

¹ valente Sp.

² vel ut Sp.

‘in actione ex testamento et rei vindicatione et hypothecaria pro legato vel fideicommisso hereditatis vel ipsa hereditate competentibus, ut ff. *de tributoria* l. *quod in heredem § eligere et de leg.*¹ ij. *cum filius § variis* [D. 14. 4. 9. § 1; D. 31. 76. § 8]. vel nisi persequendo² propositam fieret praeiudicium primae quaestioni: ut ecce ago contra te rei vindicatione pro fundo Titiano et eidem dico servitutem deberi per alium fundum quem constat esse tuum proprium. hic enim nimis festino in servitute vindicanda, cum primo debeat constare fundum petitum esse meum ad quem vindico servitutem, quam vindicem servitutem ipsam. potest enim fundus esse meus et deberi vel non deberi servitus. secus si primo petierim viam ad fundum Titianum, et deinde fundum Titianum petam. nec enim obstat exceptio, quia in petitione viae secundo fit quaestio fundi, et secunda quaestio de fundo primam quaestionem coadiuvare videtur. Item si te convenio rei vindicatione pro parte indivisa, et interim volo agere communi dividundo pro eadem re dividenda, repellor enim quia per hanc secundam fit praeiudicium primae. nam primo debet constare rem esse communem quam petatur ut dividatur. Idemque et si petam fundum rei vindicatione et interim condico fructus, ac si certum esset fundum esse meum, ut ff. *de except.* l. *fundum Titianum*, et l. *sed si ante*, et l. *fundum* [D. 44. 1. 16-17-18].’

It will be seen that the question from which Azo starts is one about the joinder of various *querelae* in one *actio*. His first general rule is that if all the *querelae* are civil (*i.e.* non-criminal), and if they relate to divers matters (*res*), they can all be put forward at the same time, or in any order the plaintiff pleases. He proceeds to state some exceptional cases. You must not join two contradictory complaints. You must not bring forward complaints in a preposterous order. Sometimes the law puts you to your election between two actions, and when you have tried one you cannot try the other [D. 14. 4. 9. § 1. ‘*Eligere quis debet qua actione experiatur, utrum de peculio an tributoria, cum scit sibi regressum ad aliam non futurum*’]. Lastly, you must not attempt to get one of your complaints prejudged by urging another. Bracton has adopted a great portion of this discourse, but has rearranged and modified it in various ways. He states four exceptions to a general rule. Apparently that general rule must be twofold: namely, (1) that a plaintiff may join various complaints in one action, and (2) that a plaintiff who has various actions open to him may make his choice between them, and, having prosecuted one, may afterwards have recourse to the others. But this might have been made clearer. Bracton’s first exception looks like an exception to a rule permitting the joinder of various complaints in one action. It is this:—Contradictory claims cannot be joined; you cannot demand both a freehold and a term of years in the same land. Nor, says Bracton, can you demand both principal and usury. This as a statement of English law seems inexplicable; for there could

¹ *et del*’ Sp.

² *persona* Sp.

surely be no talk of an open and undisguised action for *usurae*. Possibly Bracton has been misled into this curious statement by a passage in the Code dealing with a *lex commissoria* to which Azo has given him a reference [C. 4. 54. 4.]: ‘*Commissoriae venditionis legem exercere non potest, qui post praestitum pretii solvendi diem non vindicationem rei eligere, sed usurarum pretii petitionem sequi maluit.*’ The second exception is this, that claims must not be urged in a preposterous order. The first illustration that is given of this goes back to C. 4. 16. 5: ‘*Ut debitum ante de hereditate tibi solvatur ac tunc, si ad te pertineret, quaeri iubeamus, praepostera petitio est.*’ The next illustration, as to the *fructus*, is also from Azo, but is taken out of its order. Had Bracton ever seen an action similar to the action for ‘mesne profits’ of later days? We may well doubt it. Then we have a genuinely English piece: you must recover the manor to which the advowson is annexed before you can present your clerk; until you have recovered the manor you can have no *quare impedit* or assize of darrein presentment. The third exception is not very clearly stated, and Bracton has made a mess of Azo’s illustration, though he has gone behind Azo to the Digest, 44. 1. 16: ‘*Fundum Titianum possides, de cuius proprietate inter me et te controversia est, et dico praeterea viam ad eum per fundum Sempronianum quem tuum esse constat deberi. Si viam petam, exceptionem quod praeiudicium praedio non fiat utilem tibi fore putavi, videlicet quod non aliter viam mihi deberi probaturus sim, quam prius probaverim fundum Titianum meum esse.*’ Bracton’s insertion of ‘*qui Titii est*’ after ‘*Sempronianum*’ spoils all. The next illustration also he spoils by substituting ‘*si vindico a te aliquem fundum*’ for Azo’s ‘*si te convenio rei vindicatione pro parte indivisa.*’ The original of this illustration is D. 44. 1. 18: ‘*Fundi, quem tu proprium esse dicis, partem a te peto, et volo simul iudicio quoque communi dividundo agere sub eodem iudice.*’ The fourth exception is that one of the actions may be such as to preclude any recurrence to the other. Here Bracton, rejecting Azo’s illustrations, adduces the obvious English example; the demandant who has failed in a writ of right cannot fall back on the novel disseisin.

[f. 113]

{Item incidit quandoque quaestio proprietatis in actionem intentatam super ipsa possessione, sive possessorium intentatur causa recuperandae possessionis, sicut in assisa novae disseisinae, vel adipiscendae possessionis sicut in¹ assisa mortis antecessoris. et quo casu simul quandoque intentatur² proprietas cum petitorio iudicio quoad cognitionem possessionis et non quoad pronuntiationem super proprietate. Et saepius inquirendum erit de ipsa pro-

¹ Omit in Vulg.² intentantur Dig.

prietate ut de possessione magis constare possit, et sic nihil commune habet possessio cum proprietate quoad pronuntiationem, licet quoad cognitionem. vel dici poterit quod nihil commune habet quoad decisionem, habet tamen commune quoad ¹ cognitionem ut praedictum est, quia forte aliter iudex non posset cognoscere ² de uno, scilicet de possessione, nisi prius cognosceret ³ de reliquo, scilicet, de proprietate. pronuntiatio vero iustitiarum erit super possessione. Et notandum quod verbum possessionis quandoque ponitur pro re possessa, ⁴ et quandoque pro restitutione.}

NOTES.

In the Digby MS. this passage appears as a marginal note. It seems to be an afterthought suggested by the remark (p. 202) that a possessory takes precedence of a proprietary action. It does not seem to come from Azo, but it contains an allusion to D. 41. 2. 12. § 1: 'Nihil commune habet proprietas cum possessione: et ideo non denegatur ei interdictum uti possidetis, qui coepit rem vindicare. non enim videtur possessioni renuntiasset, qui rem vindicavit.' Sometimes in a possessory action, such as the novel disseisin or the mort d'ancestor, the question of ownership is incidentally raised. It is impossible to say who possesses until we know who owns. In such a case the judge has to answer the question as to ownership, though he does not decide it: he merely takes notice of ownership in order that he may decide about possession. He is not infringing Ulpian's maxim that ownership and possession have nothing in common.

The observation that in some circumstances the question of ownership presents itself as preliminary to the question of possession is one which English lawyers can easily understand. The well-known dictum of Maule J. (*Jones v. Chapman*, 2 Exch. 821) is here in point: 'If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser.' See also Pollock and Wright, *Possession*, p. 24.

{Et in fine notandum quod cum quis habeat plures [f. 114]
actiones concurrentes de eadem re, una debet experiri, ut
ff. quod metus causa, l. si mulier ⁵ § si coactus [D. 4. 2. 21.

¹ Omit previous *cognitionem* and all that follows it. Vulg. ²⁻³ Omit Dig.

⁴ *possessoria* Ed.

⁵ Digb. correctly; *similiter* Vulg.

§ 6] et ff.¹ *de tributaria* ² *actione*, l. *quod in heredem* § *eligere* [D. 14. 4. 9. § 1]. Sed videtur contra ff. *quorum legatorum* l. prima § *quod autem* ³ [D. 43. 3. 1. § 4], ubi dicitur quod si duae competant actiones quas actor sciat sibi competere, et protestatus fuerit ex una rem suam consequi velle, licebit ei, et ita potest indefinite proponere actiones. Solutio: Ubi certus sum duas mihi competere actiones, eligere cogor, ut ff. *de tributaria*, l. *quod in heredem* § *eligere* [D. 14. 4. 9. § 1]. si autem ignorem quae mihi competat, tunc sub generali verbo indefinite possum proponere actiones, ut in l. *contraria*. vel ubi ex confessione adversarii dependet mea actio, cogitur adversarius exprimere cum fuerit interrogatus, utrum pro herede vel pro possessore possideat, ut sciatur per medium quae actio mihi competat actori: licet titulum⁴ suae possessionis dicere nemo cogatur, ut C. *de heredibus* l. *cogi possessorem* [C. 3. 31. 11]. Item si quis duo breviam simul vel diversis temporibus impetraverit, dum tamen ille usus fuerit, electo uno brevi per quem agere voluerit et alio prius usus fuerit, ex secundo agere non poterit, antequam se retraxerit a primo, ut de *Abbate de Rivallibus* et *Petro de Sabaudia* coram rege. Et notandum quod ubi duae actiones de eadem re concurrunt, aut sunt rei persecutoriae, aut poenae. si autem rei tantum, tunc in electione actoris erit, qua voluerit experiri,⁵ ut praedictum est, et una electa etc. ut supra, ut ff. *locati*, l. *si merces* § *culpa nomine* [D. 19. 2. 25. § 4]. si autem poenae,⁶ tunc aut ex uno facto vel diversis. ex uno et eodem facto, ut si quis aliquid per vim rapuerit, tenetur actione furti et interdicto unde vi. in quo casu, una electa, non poterit recurrere ad aliam, nisi quatenus minus consecutus fuerit ex una, ut ff. *de privatis delictis*, l. *non utique*⁷ [D. 47. 1. 2], et ff. *de actionibus et obligationibus*, l. *si servum*⁸ [D. 44. 7. 34]. si autem ex diversis factis, tunc neutra tollitur per aliam, et ibi duae actiones de eadem re concurrentes, una aliam non consumit, ut in Institutionibus [4. 9. § 1]. }

¹ Digb. correctly; C. Vulg.² *tributaria* Dig.³ Dig. Reg.; omit reference to the § Vulg.⁴ *titulus* Dig.⁵ Dig. Cr. Reg.; *eligere* Vulg.⁶ Insert *et* Dig. and omit following *aut*.⁷ Corr. *nunquam*.⁸ Corr. *qui servum*.

NOTES.

This is a marginal note, and it is, if we are not mistaken, the most learned piece of Romanism in the whole of Bracton's treatise.

Bracton has in the body of the text been following Azo through a discussion about concurrent actions and the joinder of plaints. Azo's first general rule is that if *A* has against *B* several causes of civil action which relate to different matters, he can avail himself of all these causes. Then Azo comes to the case in which *A* has, or seems to have, several actions against *B*, but these relate to one and the same matter. He treats this case very briefly: 'Si vero eiusdem rei nomine velit quis plures proponere actiones contra unum, non potest, et ita repellitur a reo, nisi actor contra reum replicet quod reus non certificat actorem qualiter possideat, et ideo actor non potest distinguere quam actionem eligat, ut ff. *de reg. iu.* l. *nemo* § i., et *quorum leg.*¹ l. i. § *quod autem non nunquam* [D. 50. 17. 43; D. 43. 3. 1. § 4]. This is all that Azo says about this matter in his comment on the title *C. de ordine iudiciorum* [C. 3. 8].

Bracton (for so let us call the writer of the marginal note) develops and prolongs this theme. He first obtains the general rule that if *A* has two concurrent actions about the same matter he must elect between them. For this he cites

D. 4. 2. 21. § 6. Si coactus hereditatem repudiem, duplici via praetor mihi succurrit, aut utiles actiones quasi heredi dando, aut actionem metus causa praestando, ut quam viam ego elegerim, haec mihi pateat.

D. 14. 4. 9. § 1. Eligere quis debet qua actione experiatur, utrum de peculio an tributoria, cum scit sibi regressum ad aliam non futurum.

But then there seems to be an authority to the contrary.

D. 43. 3. 1. § 4. Quia autem nonnunquam incertum est, utrum quis pro legato an pro herede vel pro possessore possideat, bellissime Arrianus scribit hereditatis petitionem instituendam, et hoc interdictum [quod legatorum] reddendum, ut sive quis pro herede vel pro possessore sive pro legato possideat, hoc interdicto teneatur, quemadmodum solemus facere quotiens incertum est quae potius actio teneat: nam duas dictamus protestati ex altera nos velle consequi quod nos contingit.

How to surmount this antinomy? Bracton's solution is as follows:—If I know that I have two ways of shaping my action, and that either form of action will avail me, then I must choose between them. But if I know that one will avail me and the other will not, and have not the means of deciding which is the appropriate form, then I may put forward my claim indefinitely—that is, 'in the

¹ *quorum vel Sp.*

'alternative.' This in particular is the case if I cannot know what is the character of the defendant's possession, for then I can give my case two alternative shapes until the defendant has been driven to explain the character of his possession. True, that as a general rule a defendant cannot be forced to set forth his title.

C. 3. 31. 11. *Cogi possessorem ab eo qui expetit titulum suae possessionis edicere incivile est, praeter eum qui dicere cogitur utrum pro possessore an pro herede possideat.*

But still, as we see from this very passage, he can be compelled to say whether he is in possession *pro herede* or *pro possessore*, and, until this has been done, I may use two alternative forms of attack.

Azo has a lengthy comment on this text, *Cogi possessorem*; but Bracton has not, to all appearance, borrowed from it. Bracton turns from this somewhat speculative doctrine—for which, however, he may have had a warrant in English practice—to note an English case. At all events, as a general rule, if a man sues out two different writs for the recovery of the same piece of land, he can be compelled to make his election between them; this is shown by the case of *Peter of Savoy v. The Abbot of Rievaulx*, which is mentioned again on f. 414 b.

From a later passage in his book (f. 372, 372 b) we may gather that what Bracton has in his mind when he is speculating about the famous *Cogi possessorem*, is the use of a *Quo warranto* in order to obtain discovery of a tenant's title to land. You may use it to discover whether he is holding *pro herede* or *pro possessore*, and, this done, you may bring another action for the recovery of the land.

Once more he turns to the general problem of concurrent actions, and plunges into Romanistic learning. In case the two actions are recuperatory (*rei persecutoriae*), what has been said above holds good: the plaintiff is put to his election. In the case of two penal actions (*poenae persecutoriae*) we must distinguish whether they arise from one and the same fact, or from divers facts. If they arise from one fact, then the plaintiff must elect—*e.g.* he must elect between the *actio furti* and the interdict *unde vi*—and, having succeeded in the one, he can only use the other in so far as this may be necessary to give him the whole sum to which he is entitled.¹ This is proved by

D. 47. 1. 2. *Nunquam plura delicta concurrentia faciunt ut ullius impunitas detur: neque enim delictum ob aliud delictum minuit poenam. . . . § 3. Quaesitum est: si conductus fuerit ex causa furtiva, an nihilo minus ex lege Aquilia agi possit. et scripsit Pomponius agi posse, quia alterius aestimationis est legis Aquiliae actio, alterius conditio ex causa furtiva.*

But if the two penal actions arise from different facts, then both can be used concurrently.

Inst. 4. 9. § 1. *Nunquam enim actiones praesertim poenales de eadem re concurrentes alia aliam consumit.*

¹ See Moyle, *Institutes*, i. 582.

Until the source of this marginal note has been found elsewhere we must credit its writer with having made some search in the Institutes, Code and Digest; and he has made a tolerable use of his materials, though no doubt there were many other passages that might have been cited.

{Item notandum quod poenalis actio non datur in [L. 114] heredes, nec transit in eos, nisi lis fuerit contestata cum [L. 111 b] defuncto. Ad hoc facit ff. *de publicanis et vectigalibus* l. *interdum* § *poenae* [D. 39. 4. 16. § 13], ubi dicitur quod poenae ab heredibus peti non possunt, si non est quaestio mota vivo eo¹ qui delinquit: et hoc sicut in ceteris poenis ita et in vectigalibus. Item in causa criminis, et maxime si civiliter agatur, et² in actione iniuriarum illustres personae per procuratorem agere possunt ut iij. qu. ix. § *nisi*³ et C. *de iniuriis* l. ultima. Item in eo quod poenalis est non datur in heredes similesque personas nisi in quantum ad eos pervenerit. Item si contra pupillum agatur vel furiosum, ad damna inde non tenentur, nisi in quantum ad eos pervenerit ut supra, quia affectu carent, nisi pupillus forte doli capax est.}

NOTES.

This is another erudite marginal note, and expressly vouches both canon and civil law. A penal action is neither actively nor passively transmissible to heirs unless there has been a *litis contestatio* in the lifetime of the original parties. Also *illustres personae* may bring or defend an *actio iniuriarum* by proctor; but this is an exception to a general rule. The following are the authorities that are cited:—

D. 39. 4. 16. § 13. Poenae ab heredibus peti non possunt, si non est quaestio mota vivo eo qui deliquit: et hoc sicut in ceteris poenis ita et in vectigalibus.

c. 18, C. 3. qu. 9. Absens per alium accusare aut accusari non potest nec affinis testis admittatur. [*Dictum Gratiani*] nisi in crimine iniuriarum, in quo illustris persona etiam per procuratorem intendere et excipere potest, servatis ceteris solemnibus, ut Cod. tit. *de iniur.* l. ult.

¹ Dig. Ed. Reg.; *illo* Vulg.

² Full stop before *et* and omit *in actione* Vulg.

³ Dig. Ed. Reg.; *in fine*, not § *nisi*, Vulg.

C. 9. 35. 11. Si quando iniuriarum actio . . . a quibuslibet illustribus viris, militantibus seu sine cingulo constitutis, vel uxoribus eorum vel liberis masculini sexus vel filiabus, superstitibus videlicet patribus aut maritis illustribus, vel si adversus aliquam huiusmodi personam criminaliter forte movetur, ipsos quidem, qui super iniuria queruntur, inscribere aliaque omnia, quae in huiusmodi causis de more procedunt, sollemniter observare decernimus: licere autem illustri accusatori vel reo, uxori vel liberis masculini sexus seu filiae itidem illustris superstitis causam iniuriarum in quocumque iudicio competenti per procuratorem criminaliter suscipere vel movere, sententiam iudice contra eum qui procuratorem dederit, etsi ipse non adesset iudiciis nec causam per procuratorem diceret, legibus prolaturis.

[f. 114 b]

[III. 12. § 6.] Item actio civilis cum aliquando triplex sit et quasi mixta, scilicet, personalis, poenalis et rei persecutoria, sicut de restitutione spoliatorum, quod res corporalis et immobilis restituatur spoliato, vel quod res incorporalis, sicut ius aliquod, in debitum statum reformatur, sicut dici poterit de servitutibus, ut de iure eundi, agendi, et de iure pascendi in fundo alieno, et huiusmodi, bene poterunt haec omnia unica actione terminari, sicut per assisam novae disseisinae, secundum diversas species disseisinarum. Personalis enim est, quia tantum datur spoliato, et competit contra spoliatorem in eo quod poenalis est. Est etiam poenalis propter delictum, quia iniuste et sine iudicio, et tantum¹ persequitur spoliatorem, si spoliator² superstes sit, et in eo quod poenalis est extinguitur per mortem utriusque vel alterius ipsorum. Est etiam restitutoria tantum aliquando, et non poenalis quantum ad eos qui immunes sunt a delicto disseisinae, quia poenam sentire non debet qui immunis est a culpa, secundum quod inferius dicitur de assisa novae disseisinae. Item ex uno facto iniurioso plures possunt oriri actiones poenales in causa civili, et uni competere vel pluribus contra unum vel plures, et omnes simul bene poterunt intentari, cum non sint contrariae vel praeciu-diciales, sed sese compatiuntur, ut videri poterit. ut si quis

¹ et tantum Dig. Corb. Reg.; et quando Ed.; et quandoque Vulg.

² spoliatus Dig. Reg.

nihil iuris habeat in fundo alieno, nec aliquam servitutem, contra voluntatem domini, cuius fundus ille fuerit, fossatum levaverit, plures competere poterunt ex hoc domino ¹ fundi actiones, scilicet, assisa novae disseisinae de libero tenemento, ex quo talis sic novum opus fecerit in fundo alieno, et rem alienam sic invito domino contractaverit.² ex hoc etiam poterit ei competere et alia, quod fossatum illud levatum est ad nocumentum liberi tenementi sui, eo forte quod per fossatum ³ poterit obstrui via aliqua. item competere poterit ei ⁴ et tertia, quia per fossatum illud poterit alicuius aquae cursus iniuste ad nocumentum domini divertiri. Et quia ibi sunt plures iniuriae ex uno facto, per hoc poterit delinquens pluribus actionibus teneri uni, et aliquando pluribus, et poterit ille, cui iniuriatum est, omnibus simul si voluerit experiri, vel vicissim. plures enim actiones poenales de eadem re sive de eodem facto concurrentes, una aliam non consumit, quia, quatenus minus consecutus fuerit ⁵ per unam, consequi poterit si voluerit per aliam, si vicissim egerit et successive. Sed cum plures competant actiones ex uno facto, ut praedictum est, videndum erit utrum omnes iniuriae unica actione possint terminari, quia cum lites restringendae sint, non expedit pluribus actionibus uti, cum una sufficiat pro omnibus, ad demolendum [f. 115] illud totum quod iniuriose factum est, et ad pristinum statum reformetur,⁶ quod res sit sicut solet esse et debet. Unde necessarium erit, quod procedat assisa novae disseisinae, quod fossatum omnino prosternatur, et fiat tenementum adeo planum sicut esse solet. per hoc enim poterit via obstructa aperiri, et aqua trestornata recipere cursum debitum. et sic poterunt ⁷ omnes iniuriae unica actione terminari, et secundum diversitatem nocumentorum poterunt damna aestimari. Si autem primo tantum ageretur de via obstructa, adhuc pro magna parte remanere poterit iniuria de fossato et aqua trestornata, et si ⁸ primo tantum de aqua trestornata, adhuc remanere poterit in magna parte iniuria

¹⁻² Omit Dig., but found in Corb. Ed. Reg. ³ Dig. Reg.; insert *illud* Vulg.

⁴ Omit *ei* Dig.

⁵ Dig. Reg.; *consequitur* Vulg.

⁶ Dig. Reg. Vulg.

⁷ *possunt* Vulg.

⁸ Omit *si* Dig. Reg.

de fossato, et etiam omnino de via obstructa. et ideo melius est quod per unicam actionem omnes¹ simul terminentur iniuriæ, quam per plures. Item ex uno delicto sive² facto plures oriri poterunt actiones criminales et poenales, et competere pluribus sicut uni, et contra unum et plures, sive nascentur³ ex uno facto vel pluribus, secundum quod plenius dicetur infra de placitis coronæ, de appellis et poenalibus actionibus. Item ex uno facto vel delicto poterunt plures oriri actiones poenales, et pluribus competere sicut uni. ut si cui iniuria illata fuerit per illos qui sunt sub sua potestate, sicut sunt filius, filia vel alii qui sunt de alicuius familia, et in servitio suo verberaverit, vulneraverit, et male tractaverit contra pacem, competit ei quidem actio, qui ictus sustinuit et vulnera, et ipsam violentiam directa, ut consequatur suum interesse secundum aestimationem iniuriæ. competit etiam domino actio indirecta, quatenus sua interfuit non caruisse servitiis famulorum et operibus servorum et huiusmodi. competit etiam domino actio ex hoc, si tales verberati sunt vel pulsati in dedecus domini ipsius,⁴ etiam si servitio et operibus servorum non caruerit. et ita poterit interesse sua aliquando, ratione alterius istorum, et aliquando ratione utriusque, ut si dicat se nolle sustinuisse damnum pro tanto, nec pudorem vel dedecus pro tanto, coniunctim vel divisim. Sed videndum inter cetera quæ istarum sit praeiudicialis, et si una dependeat ex alia. et videtur quod sic: quia esto quod serviens vel servus, cui violentia illata est, in probatione sua defecerit, licet querela vera sit, videtur quod per hoc extincta sit actio domini, quia si factum non probetur, quod est principale,⁵ valere non debeat aliquid quod dependeat ex eo, et perinde⁶ quod talis non verberatur ad dedecus ipsius, nec ad damnum. sed revera quamvis tales⁷ in probatione sua defecerint,⁸ nihilominus subesse poterit verum quod ita fuit. et unde si unus non probaverit, alius potest. Idem erit, si tales se retraxerint, vel sequi noluerint.

¹ Dig. Reg.; insert *illac* Vulg.² Dig. Reg.; insert *ex* Vulg.³ *nascuntur* Vulg.⁴ *ipsius domini* Vulg.⁵ Insert *quod* Dig.⁶ Dig. Reg.; *proinde* Vulg.⁷ *ialis* Vulg.⁸ *defecerit* Vulg.

NOTES.

The marginal note on which we have just commented should be read as explicative of the first part of this paragraph, which contains the Romanesque doctrine that one of two concurrent 'penal' actions arising out of the same fact does not necessarily consume the other, but that the plaintiff successful in the first action can only recover in the second what still remains due to him by way of compensation for the whole wrong, after account has been taken of the remedy that he obtained in the former action.

Bracon supposes that a plaintiff has (1) an assize of novel disseisin for a bank thrown up on his land, (2) an assize of nuisance for a way that the bank has obstructed, and (3) another assize of nuisance for a watercourse that the bank has diverted. Apparently this can only be the case if the bank stands partly on the land of which the plaintiff is seised, partly on land over which he enjoys easements. A man can have no 'via,' no right of way, over his own land. But still it would seem from this passage that in such a case the assize of novel disseisin might be so used as to secure the removal of the whole of the obnoxious bank.

The last lines of this section refer to a matter about which we have little ancient information—the father's or master's right to sue in respect of damage done to his children, servants, or other members of his *familia*. Bracon has his eye on the parallel passages in the Institutes, 4. 4. 2, and in Azo's commentary on the Code, C. *de iniuriis* (9. 35), but seems to modify Azo's doctrine. An *actio iniuriarum* is given to the person who has suffered the *iniuria*. 'Patitur autem quis *iniuriam* non solum per semet ipsum sed etiam per liberos suos quos *in potestate habet* : item per uxorem suam, id enim magis praevaluit.' The main Roman rule is thus stated by Mr. Moyle (vol. i. p. 537) : 'The *actio iniuriarum* was one of the few actions which a person "in "power" was able to bring in his or her own name, Dig. 44. 7. 9. 'As a general rule, *iniuria* to *A* would not affect *B* unless it was so intended; but where the relation between the two was intimate and such as to have been known to the delinquent, the intention was presumed.' Therefore, as Azo explains, much may depend on the question whether or no the wrong-doer knew the person whom the outrage primarily affected to be a *filius familias*, or believed him to be a *pater familias*; see D. 47. 10. 18. § 4. The text of the Institutes turns from the *filius familias* and the wife to the slave : 'Servis autem ipsis quidem nulla iniuria fieri intellegitur, sed domino per eos fieri videtur : non tamen isdem modis, quibus etiam per liberos et uxores, sed ita cum quid atrocius commissum fuerit et quod aperte ad contumeliam domini respicit. veluti si quis alienum servum verberaverit, et in hunc casum actio proponitur : at si quis servo convicium fecerit vel pugno eum percusserit, nulla in eum actio domino competit.' Azo gives the doctrine in this form : 'Item patimur iniuriam

'per servos nostros in duobus casibus, id est, si fiat ois iniuria etiam
'levis ad sugillationem nostram. item et si non fiat ad sugillationem
'nostram sed atrox fuit iniuria, maxime si verberibus vel quaestionibus
'fieret.' As to the slave himself, Azo denies him an action even when
there has been an *atrox iniuria*; but some think otherwise.

Bracton blurs these outlines; but he does this intentionally, and all the changes that he makes tend towards the English law of later days. In the first place, the Roman *iniuria* loses in his hands the sense of outrage and insult. In the second place, the sharp notion of the *patria potestas* gives way to the vaguer *familia* in its mediæval sense. The case of my *filius familias* is, for the purpose that is now in hand, the same as that of the servant, free or unfree, who forms part of my *familia*, my household, my retinue. The difference between bond and free is ignored. We have to remember that the villain has his own action against everyone but his lord; he is free in relation to all other men. Then an element quite alien to the Roman text is introduced. The action of the father or the master will usually be based upon pecuniary loss. Already he will—to use the technical phrase of later days—sue upon a 'per quod servitium amisit.' Bracton holds, indeed, that this element of pecuniary loss is not essential in all cases. The action may be based, not upon the loss of service, but upon insult, contumely, shame. This is not un-English. Bracton appeals to the formula which in his day was in common use—'so that I would not
'have suffered that damage for so many shillings, or that shame for so
'many.' In the French pleadings of his time the words which express this contrast are *damage* and *hontage* or *hontage*. In precedents for the local courts we generally find that these two are coupled; but there may well have been cases in which a father or master might sue in respect of the *hontage* that had been done to him by an assault upon his dependants, though he could not prove any loss of service. Still we see loss of service thrust forward into the front line. Consequently the question whether the wrong-doer knew of the existence of a relationship between the plaintiff and the primary sufferer becomes unimportant. Finally, it is noteworthy that of a wife Bracton says nothing.

For a moment he seems tempted to say that the action of the servant or child is 'prejudicial' to the action of the father or master, so that the latter action cannot succeed if the former has failed. He and his contemporaries have a deep reverence for the order of logic which postpones the accessory to the principal. This is prominent in the law about appeals for felony. But the temptation is resisted; the master's action is not really accessory to or dependent on the servant's.

And now at last, all speculative questions being solved, Bracton can turn to the procedure of the justices in eyre. But here we must leave him.

APPENDICES.

APPENDIX I.



BRACTON AND TANCRED.

Bracton, when he is introducing the law of inheritance, has to speak of legitimacy, and this obliges him to say something of the doctrine of putative marriages, a specialty of the canonists. According to the law that they elaborated in the twelfth century, the impediments to lawful marriage were so numerous and so secret, that it must have been a common enough event for a man and woman to believe that they were husband and wife, while in truth they were living in unlawful concubinage. Some of the evil effects of this unwholesome law were evaded by a doctrine of putative marriage. If man and woman take each other as husband and wife, and one at least of them is ignorant of the existence of any impediment to their marriage, then the children who are born of this union while this ignorance continues, are born legitimate. There is here a putative marriage, though there is no valid marriage. Bastardy seems to be regarded as a punishment inflicted on children for the sin of their parents, and, when one of the parents believed in good faith that there was no impediment to the would-be marriage, we have a case in which this punishment would be undeserved.

The canonist Tancred wrote a famous little book about marriage: *Summa de Sponsalibus et Matrimonio*. He did not die until 1234 or thereabouts, but this book seems to have been written between 1210 and 1214. It contains the following passage about putative marriages. Three of the decretals that he cites in it dealt with English cases.²

Tractatum est supra de matrimoniis. Sed quia matrimonia causa filiorum contrahuntur, ideo subsequenter de

¹ J. F. von Schulte, *Geschichte der Quellen und Literatur des canonischen Rechts*, Stuttgart, 1875, vol. i. pp. 201-2.

² Our text is taken from *Tancredi Summa de Matrimonio*, ed. Wunderlich, Gottingae, 1848, Tit. 'Qui filii sint legitimi.' Tancred has at command the first three of the *Compilationes Antiquae*. The Gregorian statute-book is not yet made.

ipsis filiis videamus, ostendentes qui filii sint legitimi, et qui non, et qualiter non legitimi legitimantur, et quid eis prodest legitimos esse. Legitimus filius est qui de legitimo matrimonio est natus, vel de eo quod in facie ecclesiae legitimum reputatur, quamvis in veritate matrimonium non fuerit, ut expresse probatur Extra. *de desponsatione impuberum*, 4. 2, c. *Accessit*, in fine [Comp. Prim. 4. 2. 6]¹ et Extra. *qui filii sint legitimi*, c. *Cum inter Ioannem* [Comp. Prim. 4. 18. 2],² Extra. *qui filii sint legitimi*, c. *Gaudemus* [Comp. Tert. 4. 12. 4].³ Et hoc intellego verum esse quando ambo coniuncti sunt bona fide credentes se esse legitime copulatos, vel dummodo alter eorum tantum hoc credat. quia si mulier alicui coniugato nubat bona fide credens eum solutum et filios ex eo suscipiat, legitimi iudicantur et utrique parenti succedunt, ut expresse traditur Extra. *qui filii sint legitimi*, c. *Ex tenore* [Comp. Tert. 4. 12. 3].⁴ et est argumentum ff. *de ritu nuptiarum*, l. *Qui in provincia*, §. ult. [Dig. 23. 2. 57. § ult.], C. *de incestis nuptiis*, l. *Qui contra* [Cod. 5. 5. 4]. Si vero ambo laesam habent conscientiam, et scienter contra canones coniuncti sunt matrimonialiter, filii eorum illegitimi iudicantur, ut Extra. *qui filii sint legitimi*, c. *Referente* [Comp. Secund. 4. 11. 1],⁵ Extra. e. t. *Causam quae* [Comp. Prim. 4. 18. 4],⁶ et C. 35. qu. 3 *Coniunctiones* [C. 35. qu. 2. et 3. c. 2], et in praeallegatis decretalibus est argumentum, et est expressum Extra. *de dote restituenda*, c. 1 [Comp. Tert. 4. 15. 1].⁷

Shortly after Tancred had written this, the Church was compelled to define a limit to the doctrine of putative marriages. No unlawful union was to enjoy the privilege of a putative marriage unless it had been celebrated in face of the church. It will be remembered that for the constitution of a valid marriage no ecclesiastical ceremony was requisite, though those who did not celebrate their marriages with the due religious rites were sinners, and were to be punished for their sin.

¹ A decretal of Alexander III. sent to the Archbishop of York = X. 4. 2. 5.

² A decretal of Alexander III. = X. 4. 17. 2.

³ A decretal of Innocent III. = X. 4. 17. 15.

⁴ A decretal of Innocent III. = X. 4. 17. 14.

⁵ A decretal of Celestin III. sent to the Archbishop of York = X. 4. 17. 10.

⁶ A decretal of Alexander III. sent to the bishops of Winchester and Exeter, and the abbot of Ford = X. 4. 17. 4.

⁷ A decretal of Innocent III. = X. 4. 20. 5.

But for the future the children born of a union that was not a valid marriage were always to be illegitimate unless that marriage had been celebrated *in facie ecclesiae*. In other words, the requirement of a religious ceremony was now added to the requirement of good faith in one of the contractors, if the issue of an invalid marriage was to escape the stain of bastardy. This rule was laid down in 1215 by the Fourth Lateran Council (c. 51), in the following words :

Si quis vero huiusmodi clandestina vel interdicta coniugia inire praesumpserit in gradu prohibito, etiam ignoranter, soboles de tali coniunctione suscepta prorsus illegitima censeatur, de parentum ignorantia nullum habitura subsidium, cum illi taliter contrahendo non expertes scientiae, vel saltem affectatores ignorantiae videantur. Pari modo proles illegitima censeatur, si ambo parentes, impedimentum scientes legitimum, prae omne interdictum, etiam in conspectu ecclesiae contrahere praesumpserunt.

Such was the law of Bracton's time. In expounding it he seems first to borrow from Tancred, either at first or second hand, a statement of what we may call the Church's common law. Next he transcribes some words from the canon of the Lateran Council which touches this matter, and lastly he falls back on a decretal of Alexander III. which he may have taken from the Gregorian or from some older compilation. It may be that he found all these passages together in some text book, but it will be noticed that, while transferring to his pages several canonical texts, he is careful to exclude the doctrine of legitimation *per subsequens matrimonium*. The passage in question (Bracton, f. 63) is as follows :

Item videndum quis dici debeat heres legitimus, quia, secundum quod inferius dicitur, liberorum quidam sunt filii et heredes, sicut sunt illi qui ex iustis nuptiis procreati sunt et progeniti, et ibi plenius. Legitimus vero heres et filius est quem nuptiae demonstrant esse legitimum, sicuti 'ille qui in facie ecclesiae legitimus reputatur, quamvis in 'veritate matrimonium non fuerit,' 'cum ambo, tam vir 'quam uxor, bona fide coniuncti credentes se legitime copulatos esse,' cum sint re vera consanguinitate vel affinitate coniuncti, vel alio modo quod matrimonium stare non posset, 'vel dummodo alter eorum tantum hoc credat.' 'Quia cum mulier alicui coniugato nubat bona fide credens 'cum esse solutum' cum sit alteri mulieri copulatus, 'et ex 'eo filios suscipiat, tales legitimi iudicantur et heredes,'¹ sive post matrimonium contractum progeniti sunt et nati,

¹ The words here marked as a quotation seem to be taken from Tancred.

sive ante matrimonium geniti et in matrimonio nati,¹ sive in matrimonio geniti et post matrimonium nati,¹ sive solutum sit matrimonium per mortem parentum, vel in vita parentum ex quacumque causa per divortium, et hoc si inter parentes publice contrahantur sponsalia vel matrimonium, dum tamen si divortium in vita parentum celebratur vel si inter tales clandestina fuerunt coniugia ab initio, vel contracta contra interdictum ecclesiae in gradu prohibito, 'etiam ignoranter, soboles de tali coniunctione suscepta prorsus illegitima est censenda, de parentum ignorantia nulla habitura subsidium, cum illi taliter contrahendo' clandestina coniugia 'non expertes scientiae vel saltem affectatores ignorantiae videantur. Pari modo proles illegitima est censenda si ambo parentes impedimentum scientes legitimum, etiam praeter omne interdictum, in facie ecclesiae contrahere praesumpserint.'² quod quidem non esset si in facie ecclesiae hoc facerent ignoranter, uterque scilicet vel eorum alter. Sed in omni casu ubi clandestina sunt coniugia, non excusabit ignorantia, nec etiam si publice contracta, si hoc fuerit praesumptive contra interdicta ecclesiae. Et ad hoc facit decretale cuius verba haec sunt³ :—'Cum inter I. virum et V. mulierem divortii sententia sit canonice prolata, filii eorum non debent exinde sustinere iacturam, cum parentes eorum publice et sine contradictione ecclesiae inter se contraxisse noscantur. Ideoque sancimus ut filii eorum quos ante divortium habuerint et qui concepti fuerint ante latam sententiam, non minus habeantur legitimi, et quod in bona paterna hereditario iure succedant et de parentum facultatibus nutriantur.'⁴

¹ Observe that the children must be born after the (putative) marriage if they are to be legitimate.

² The words marked as a quotation come from Concil. Later. IV. (1215), c. 51, which appears in the Gregorian statute-book as X. 4. 3. 3.

³ Observe that Bracton does not give the simple *ut Extra.* which a professed canonist would have given.

⁴ This decretal of Alexander III. appears as X. 4. 17. 2. It also appears as Comp. Prima, 4. 18. 2.

APPENDIX II.

BRACTON AND BERNARD OF PAVIA.

Bracton's debt to the canonists is best manifested by his discourse on the various kinds of homicide (f. 120 b). This he seems to have derived either directly or at second hand from Bernard of Pavia. Bernard¹ was born at Pavia, studied law at Bologna, became bishop of Faenza in 1191 and bishop of his native town in 1198; he died in 1213. About 1190 he published a collection of 'extravagant' decretals: that is to say, of decretals which were wandering about outside Gratian's Decretum, having been published since Gratian finished his book. This collection Bernard called *Breviarium Extravagantium*. It is now known as *Compilatio Prima*, being the first of the five ancient collections (*Compilationes Antiquae*) which intervene between the work of Gratian and the work of Gregory IX.² Then a few years later—between 1191 and 1198—he published a *Summa Decretalium*, a practical handbook of Canon law; its arrangement was based upon that of his *Breviarium*. This has been edited by E. A. T. Laspeyres—*Bernardi Papiensis Summa Decretalium*, Ratisbonae, 1860. It contains the following passage about homicide in Lib. v. tit. 10, *De homicidio voluntario vel casuali*. In reading it we have to remember that the scheme of the *Summa* is the scheme of the *Breviarium*, and that therefore when Bernard by the sign *cod.* sends us to a decretal *in eodem titulo*, he is sending us to Lib. v. tit. 10 in the *Compilatio Prima*.³ Our text we take from Laspeyres. A few of the variants that he has noted will be given at the foot of our page. Beneath Bernard's discourse we print Bracton's.

¹ J. F. von Schulte, *Geschichte der Quellen und Literatur des canonischen Rechts*, Stuttgart, 1875, vol. i. pp. 78–82, 175–182.

² *Quinque Compilationes Antiquae*, ed. Aemilius Friedberg, Leipzig, 1882.

³ These references the reader can best trace by the use of Friedberg's *Quinque Compilationes*, p. 57, which will send him on to the Gregorian collection. If he has not lately been looking at the *Corpus Iuris Canonici*, he may be grateful for being reminded that Dist. and c. point to the first part of Gratian's Decretum; that C. and qu. point to the second part of that book; that X. points to the *Decretales Gregorii Noni*. Friedberg's edition of the *Corpus Iuris Canonici* (Leipzig, 1879–81) has been used.

BERNARD. Eginus de quadam specie homicidii. Nunc
BRACON. Est etiam inter alia crimina, crimen capitale

- (a) generaliter de homicidiis agamus.
(b) quod in parte tangit ipsum regem, cuius pax infringi-
- (a)
(b) tur, et in parte privatam personam, qui nequiter et
- (a) Videamus
(b) contra pacem domini regis occiditur. Et unde
- (a) igitur quid sit homi-
(b) inprimis dicendum est de homicidio quid sit homi-
- (a) cidium, quae eius species, qua
(b) cidium, et unde dicatur, quae eius species, et qua
- (a) poena homicidae puniantur, et quae dispensatio fiat
(b) poena homicidae puniantur.
- (a) erga¹ clericum homicidam. Homicidium est
(b) Et est homicidium
- (a) hominis occisio ab homine vel ab hominibus facta.
(b) hominis occisio ab homine facta.
- (a) nam si quattuor vel plures homines aliquem vulnera-
(b) si enim a bove, cane, vel alia re, non dicetur proprie
- (a) verint et ipse inde mortuus fuerit, omnes qui eum
(b) homicidium. Est enim dictum homicidium ab
- (a) vulneraverint homicidae reputantur, ut C. xxij. qu.
(b) homine et caedo, quasi hominis caedium.
- (a) ult. si quattuor [C. 23. qu. 8. c. 34] et Dig. ad L.
(b)
- (a) Aquil. l. Item Mela, § 2 [Dig. 9. 2. 11. § 2]. Species
(b) Species
- (a) homicidii plures sunt. Est enim homicidium
(b) homicidii sunt plures.

¹ circa Al.

- (a) actus et homicidium voluntatis, unde super illud
(b)
- (a) Apostoli¹ 'plenos homicidiis,' dicit expositor²: *Ideo*
(b)
- (a) *dicit pluraliter plenos homicidiis, quia est homicidium*
(b)
- (a) *actus et est homicidium voluntatis*, nam qui vult et
(b)
- (a) laborat occidere, licet opere non occidat, voluntate
(b)
- (a) tamen dicitur homicida, ut C. vi. qu. 1. § *Verum* [dic-
(b)
- (a) tum Gratiani ad C. 6. qu. 1. c. 21] et Dig. *ad L. Corn.*
(b)
- (a) *de sicariis* l. 1 [Dig. 48. 8. 1] et infra eod. *Sicut*
(b)
- (a) [Comp. Prim. 5. 10. 7].³ Item est homicidium cor-
(b)
- (a) porale et est homicidium spirituale:
(b) nam aliud spirituale aliud corporale.
- (a)
- (b) de spirituali vero ad praesens non est hic dicendum,
- (a) corporale quo homo occiditur corporaliter,
(b) sed corporale est quo homo occiditur corporaliter,
- (a) spirituale quo spiritualiter et quadam fictione⁴ iuris
(b)
- (a) quasi occidi videtur. quod fit pluribus modis, odiendo,
(b)

¹ S. Paulus ad Romanos, i. 29.

² The name of this expositor was unknown to Laspeyres.

³ A decretal of Alexander III. sent to the bishop of Exeter = X. 5. 12. 6.

⁴ *per quamdam fictionem* Al.

- (a) detrahendo, opprimendo, male consulendo, nocendo,
(b)
- (a) victum subtrahendo. de quinque primis habes de poen.
(b)
- (a) Di. 1. *Homicidiorum, Omnis, Noli, Homicidium*. [C. 33.
(b)
- (a) qu. 3. dist. 1. cc. 24, 25, 27, 28], de sexto legitur Di.
(b)
- (a) lxxxvj. *Non satis* in fin. [Dist. 86. c. 14] et Dig. *de*
(b)
- (a) *agnoscend. liberis l. Necare* [Dig. 25. 3. 4]
(b) et hoc du-
- (a) Reus autem homicidii
(b) pliciter, lingua vel facto. Lingua tribus modis,
(a) dicitur quis facto, praecepto, consilio et defensione,
(b) praecepto, consilio, defensione
(a) ut Di. 1. *Si quis viduam* [Dist. 50. c. 8].
(b) sive tuitione.
(a) item occasione¹ ut C. xxiii. qu. 5. *Cum homo* [C. 23.
(b)
- (a) qu. 5. c. 19] et Dig. *ad L. Corn. de sicar. l. Nihil* [Dig.
(b)
- (a) 48. 8. 15]. Homicidii vero corporalis quattuor sunt
(b)
- (a) species, quia fit quattuor modis, iustitia,
(b) Facto, quattuor modis, scilicet iustitia,
(a) necessitate, casu et voluntate. Iustitia, ut cum iudex
(b) necessitate, casu et voluntate. Iustitia, ut cum iudex
(a) vel minister reum iuste condemnatum
(b) vel iustitarius vel minister reum iuste damnatum

¹ *accusatione* Al.

- (a) occidit. necessitate, ut dum instante latrone vel hoste
(b) occidit.
- (a) occidis eum, ne occidaris ab eo. casu, ut dum alii
(b)
- (a) operi instas,¹ casu aliquis superveniens occidatur, ut
(b)
- (a) dum arbor, quam praecidis, ruit super aliquem et eum
(b)
- (a) occidat, vel dum iacis lapidem ad avem et interficis
(b)
- (a) hominem. voluntate, ut dum tua sponte aliquem
(b)
- (a) occidis. Circa illud homicidium quod fit iustitia sic
(b)
- (a) distinguendum puto: Cum ² minister iudicis occidit
(b)
- (a) reum, aut condemnatum aut non condemnatum,
(b)
- (a) scilicet ad mortem. item ubi condemnatum aut id
(b).
- (a) facit amore iustitiae aut livore,³ et ubi amore iustitiae
(b)
- (a) aut est iussus hoc facere aut iniussus.⁴ Si occidat non
(b)
- (a) condemnatum, reus est homicidii, quia nimis festin-
(b)
- (a) avit, ut ar. C. xi. qu. 3, *Eorum* [C. 11. qu. 3. c. 76] et
(b)
- (a) ar. C. xxiii. qu. 4, *Illud* [C. 23. qu. 4. c. 26]. si vero
(b) Istud

¹ *instans* Al.³ *livore vindictae* Al.² *Putat cum* Al.⁴ *non iussus* Al.

- (a) occidit livore, similiter est reus homicidii, ut ar. C.
 (b) autem homicidium, si fit ex livore vel delectatione
- (a) xxiii. qu. 4 § *Potest* [dict. Grat. ad C. 23. qu. 4. c. 26]
 (b) effundendi humanum sanguinem, licet iuste occidatur
- (a) et qu. 5. *Officia, Non est iniquitatis* [C. 23. qu. 5. cc. 16,
 (b) iste, tamen peccat mortaliter propter intentionem cor-
 (a) 17]. si autem condemnatum occidit amore
 (b) ruptam. si vero hoc fiat ex amore
- (a) iustitiae et iussus, non peccat, alioquin peccat, ut C.
 (b) iustitiae, non peccat iudex ipsum condem-
- (a) xxiii. qu. 5. *Miles, Cum minister, Lex eterna* [C. 23. qu.
 (b) nando et praecipiendo ministro ut occidat eum, nec
 (a) 5. cc. 13, 14, 15].
 (b) minister si missus a iudice occidat condemnatum.
- (a)
 (b) peccaret tamen uterque si haec fecerint iuris ordine
- (a) Circa illud homicidium quod fit neces-
 (b) non servato. Necesse-
- (a) sitate¹ sic distinguendum videtur: Qui occidit
 (b) sitate, quo casu distinguendum erit
- (a) ex² necessitate, aut sua culpa pervenit in necessitatem
 (b)
- (a) aut non. item si non sua culpa, aut aliter potuit
 (b) utrum necessitas illa fuit
- (a) evadere aut non. si quidem sua culpa pervenit
 (b) evitabilis vel non.
- (a) in necessitatem, sibi debet imputare et est homicidii
 (b)
- (a) reus, ut arg. Di. vi. *Testamentum* [Dist. 6. c. 1] et Di.
 (b)

¹ ex necessitate Al.² in Al.

- (a) l. *Clericum* [Dist. 50. c. 5], *De clericis* 1 et 2 [Dist. 50.
(b)
- (a) cc. 6, 36] et C. xxii. qu. 4 *Inter cetera* [C. 22. qu. 4.
(b)
- (a) c. 22] et C. xi. qu. 3 *Excellentissimus* [C. 11, qu. 3. c.
(b)
- (a) 102] et ar. Dig. *si quis caution.* l. 2. § *Quod* [Dig. 2. 11.
(b)
- (a) 2. § 6] et Dig. *de action. et oblig.* l. 1. § 1 [Dig. 44. 7.
(b)
- (a) 1. § 1].¹ si vero sine culpa sua et potuit aliter
(b) si autem evitabilis et evadere potest absque
(a) evadere, i. e. si necessitas fuit evitabilis, ei homicidium
(b) occisione tunc erit reus
(a) imputatur, ut infra eod. *Suscepimus* [Comp. Prim. 5.
(b) homicidii,
(a) 10. 11],² alioquin non est imputandum, ut ar. Di. l.
(b) si autem inevitabilis quia occidit hominem
(a) § *Quod vero* [dict. Grat. ad Dist. 50. c. 35] et infra eod.
(b) sine odii meditatione, in metu et dolore animi, cum
(a) *Qui sine* [Comp. Prim. 5. 10. 3], *Interfecisti* [Comp.
(b) aliter evadere non posset, non tenetur ad poenam
(a) Prim. 5. 10. 4]. Circa illud quod fit casu,
(b) homicidii. Casu, sicut per
(a)
(b) infortunium, cum aliquis proicit lapidem ad avem vel
(a)
(b) animal et alius transiens ex insperato percutitur et
(a)
(b) moritur, vel si quis arborem inciderit, et per casum

¹ The last of these citations does not seem to be very apt.

² A decretal of Alexander III. — X. 5. 12. 10.

- (a)
 (b) arboris aliquis opprimatur et huiusmodi. Sed hic
 (a) distingue an ille qui casu occidit instabat
 (b) erit distinguendum utrum quis dederit operam
 (a) licito operi et adhibuit illam diligentiam quam
 (b) rei licitae vel illicitae. si illicitae, ut si lapidem pro-
 (a) debuit aut non. primo casu non imputatur sibi, sed
 (b) iciebat quis versus locum per quem consueverunt
 (a) casui et fato et fortunae,¹ ut Di. l. *Hi qui, Saepe, Si*
 (b) homines transitum facere, vel dum insequitur quis
 (a) duo [Dist. 50. cc. 49, 50, 51] et Cod. *ad L. Corn. de*
 (b) equum vel bovem et aliquis a bove vel equo percussus
 (a) *sicar. l. 1* [Cod. 9. 16. 1]. alioquin si vel non in-
 (b) fuerit et huiusmodi, hoc imputatur ei. Si vero licitae
 (a) stabat operi licito vel non adhibuit illam diligentiam
 (b) rei operam dabat, ut si magister causa disciplinae dis-
 (a) quam debuit, sibi debet imputari ut Di. l. *Eos vero,*
 (b) cipulum verberat, vel si cum quis deponebat foenum
 (a) *Si qua foemina, Si quis voluntarie* [Dist. 50. cc. 42, 43,
 (b) de curru vel arborem incidebat et huiusmodi, hic si
 (a) 44]. et infra eod. *Continebatur* [Comp. Prim. 5. 10.
 (b) adhibuit diligentiam quam potuit, scilicet, respiciendo
 (a) 9.]². nec obloquitur sequens hic capitulum, scil.
 (b) et proclamando, sed non nimis tarde vel dimisse, sed
 (a) *Lator* [Comp. Prim. 5. 10. 10],³ quia hic culpa occi-
 (b) tempore congruo et alte, et ita quod si aliquis ibi erat
 (a) dentis, ibi culpa occisi mors intervenit. De his hos
 (b) vel illuc veniebat posset aufugerè et sibi praecavere,
 (a) versus habe: Si licitus, cautus, non est culpabilis
 (b) vel magister non excedendo modum in verberando

¹ *et facto fortunae* Al.² A decretal of Alexander III. = X. 5. 12. 8.³ A decretal which according to some authorities was sent by Alexander III. to the bishop of Exeter = X. 5. 12. 9.

- (a) actus. In reliquis culpam reor et pro crimine mule-
- (b) discipulum, non imputatur ei. Sed si dabat operam
- (a) tam.—Item si sine ullo opere alicui invito et impru-
- (b) rei licite et non adhibuit diligentiam debitam, im-
- (a) denti telum manu fugit et alium peremit, non est ei
- (b) putabitur ei. Voluntate, ut si quis ex certa scientia
- (a) imputandum, ut C. xxiii. qu. 5. *Si homicidium* [C. 23.
- (b) et in assultu praemeditato, ira vel odio, vel causa
- (a) qu. 5. c. 41].
- (b) Iucuri, nequiter et in felonia et contra pacem domini
- (a)
- (b) Regis aliquem interfecerit.

The first distinction that the canonist draws is between corporal and spiritual homicide. By spiritual homicide are meant evil thoughts and intents which *in foro conscientiae* are as bad as homicide. For example, among the texts on which Bernard relies is a passage cited by Gratian from Augustin, in which we find this:—‘Homicidium lege vetitum putabatur non aliud esse nisi corporis peremptio. Aperuit ergo Dominus omnem iniquum motum ad nocendum fratri in homicidii genere deputari [C. 33. qu. 3. dist. 1. c. 28].’ This, of course, is a doctrine which even a canonist would not have attempted to enforce *in foro externo*. Bracton dismisses it very briefly: ‘de spirituali vero ad praesens non est hic dicendum.’

Then, again, a man may be guilty of homicide *facto, praecepto, consilio et defensione*. We easily understand that homicide can be committed by deed, or by command, or by counsel; as our forefathers would have said, it can be committed by rede or by deed. The word *defensione*, however, raises a difficulty. Bracton glosses it with *sive tuitione*, and thus shows us that he takes it to mean *protection*. How a man commits homicide ‘by protection’ it is not easy to see; and this is not the context in which we ought to be speaking of homicide perpetrated ‘in defence’ of one’s self or of others. However, in the Latin of some ages and countries *defensio* may well mean *prohibition*. Prohibition would come in naturally after command and counsel; A may command B to slay C, or forbid B to save C’s life. The passage on which Bernard is building is the following:—‘Similiter si homicidii aut facto, aut praecepto, aut consilio, aut defensione post baptismum conscius fuerit, et per aliquam subreptionem ad clericatum venerit, deiciatur . . . [Dist. 50. c. 8].’ It would seem, however, that in this passage *defensione* is a corrupt variant from

assensione,¹ a word that would be appropriate enough in this place. However, Bernard thought that he had to deal with *defensio*, and Bracton thought that *defensio* meant *tuitio*.

Bernard adds *occasione*, and sends us to Ulpian [Dig. 48. 8. 15]:—
'Nihil interest, occidat quis an causam mortis præbeat.' Bracton here omits *occasione*; but elsewhere (f. 136 b) he quotes Ulpian's words, which afterwards pass into Coke's Third Institute (f. 5) as Bracton's.

After this we come to the important part of Bernard's work. Homicide 'by necessity' is excusable if, but only if, the necessity was 'inevitable' and was not brought upon the slayer by his own fault. Homicide 'by misadventure' is excusable if, but only if, the slayer was doing a lawful act and was doing it with all due care. In considering these doctrines we have to remember that the question to which Bernard is addressing himself in this passage is the question whether the slayer is in any degree guilty of the death that his act has occasioned. He is not for the moment concerned to distinguish between divers degrees of guilt or between divers punishments. The death either is 'imputable' or it is not 'imputable.' We have also to remember that when he has declared that the death is imputable to the accused, the canonist can proceed to distinguish divers degrees of guilt because he has a large choice of punishments at his command. This will be apparent from the following passage which immediately succeeds that which has been printed above.

Pœna homicidii iusti non invenitur, nec etiam credimus imponendam.² De homicidio necessitatis evitabilis, vel ad quam occisor sua culpa pervenit, credo talium pœnam vel poenitentiam relinquendam esse arbitrio iudicantis.³ De homicidio casuali potest secundum leges agi lege Aquilia, scilicet, ad pecuniariam pœnam, ut Dig. ad L. Aquil. l. 2. 3. 4. 5. 6. 7. 8. 9. 10. [Dig. 9. 2. 2-10]. non tamen poterit agi ad pœnam corporalem, ut Cod. ad L. Cornel. de sicar. l. 1. et l. Eum [Cod. 9. 16. 2 et 4]. si tamen quis per lasciviam occidit in quinquennium relegatur, ut Dig. ad L. Corn. de sicar. l. 4. § 1 [Dig. 48. 8. 4. § 1]. secundum canones autem quinquennii est poenitentia imponenda, ut Di. l. Eos vero, Si quis voluntarie [Dist. 50. cc. 42, 44]. Clericus pro casuali homicidio deponetur, nisi dispensatione toleretur, ut Di. l. Clerico [Dist. 50. c. 37] et infra eod. Continebatur [Comp. Prin. 5. 10. 9]. Pœna vero homicidii voluntarii est secundum leges ut sublimiores deportentur omnibus bonis ademptis, minores capite puniantur, ut Dig. ad L. Corn. de sicar. l. 3. § Legis et l. penult. [Dig. 40. 8. 1. 3. § 5 et l. 16]. secundum canones autem clericus deponitur, laicus excommunicatur, ut Di. l. Si quis viduam, Si quis voluntarie [Dist. 50. cc. 8, 44].

The flexibility, or rather the laxity, of the law will be noticed. For example, the punishment or penance of the man who has slain

¹ Friedberg's edition of the Decretum, col. 179.

² This sentence is not in all MSS.

³ iudicis Al.

in an 'evitable' necessity, or in an 'inevitable' necessity induced by his own fault, is 'in arbitrio iudicantis.' What is more, the system of dispensations makes the penal system yet more 'arbitrary.' Bernard proceeds to explain how 'circa homicidium casuale fit dispensatio 'magna, maior, et maxima.' Thus a priest guilty of 'casual' homicide ought to be degraded from his orders; but a *magna dispensatio*, while degrading him from the priesthood, may leave him in the diaconate; a *maior dispensatio* may suffer him to remain a priest, while forbidding his further promotion; a *maxima dispensatio* will allow of his becoming a bishop.

The English law of Bracton's day was not really ready to receive the distinctions between the various kinds of homicide that Bernard and his fellows were elaborating, for it had no large choice of punishments. The only courses open to it were (1) that of acquitting the manslayer of all guilt, (2) that of granting him a pardon, and (3) that of sending him to the gallows, for it knew no other punishment for homicide. Therefore, anyone who reads Bracton's *De Corona* can easily distinguish between the rough English law and the academic discourse. Such influence as the canonical jurisprudence could exercise at this point must have tended to maintain the rigour of our temporal law. We are assured, for example, by these cosmopolitan jurists that if a man commits homicide by misadventure while doing an unlawful act, the death that he occasions is 'imputable' to him. If we translate this doctrine into English terms, it will mean that such a man, unless the king pardons him, must be hanged by his neck until he is dead.

APPENDIX III.

BRACTON AT COURT.

During a brief space of time the extant Charter Rolls enable us to see Bracton at court. The following list of the witnesses who attest certain royal charters may be of some interest. The rolls for 37 Henry III. (28 Oct. 1252-27 Oct. 1253) and for 38 Henry III. (1253-4) were 'drawn blank,' so also were the rolls for 42-3-4-5-6 Henry III. (1257-1262). The roll for 40 Henry III. (1255-6) is missing. On the other hand, the rolls for 39 Henry III. (1254-5) and 41 Henry III. (1256-7) have yielded the following results.¹

1255 *Feb. 5, Westminster.* Walter [de Cantilupe] Bishop of Worcester, Laurence [de S. Martin] Bishop of Rochester, William [de Kilkenny] Bishop of Ely, Richard Earl of Cornwall our brother, Philip Luvell our Treasurer, Artaud de S. Romano Keeper of our Wardrobe, Henry de Bathonia, Henry de Mara and Henry de Brettone our Justices, Bertram de Cryolle, John de Gray and Drogo de Barentyn our Stewards, Henry de Wengham Dean of St. Martin's London. [*Roll 51. m. 8.*]

1255 *Feb. 11, Westminster.* Richard de Clare Earl of Gloucester and Hertford, John de Grey, Bertram de Cryolle, Drogo de Barentin, Henry de Bathonia, Henry de Mara, Henry de Brettone, Imbert Pogeis, Philip de Vallibus, William de S. Ermine. [*Roll 51. m. 8.*]

1255 *Ap. 23, Westminster.* Ralph fitz Nicholas, Bertram de Criolle, John de Grey, John de Lexinton, Drogo de Barentin, William de Grey, Henry de Bathonia, Henry de Mara, Henry de Brattone, Nicholas de Turri, Nicholas de S. Maur, Philip de Vallibus, William de S. Ermine, William Gernun. [*Roll 51. m. 6.*]

1255 *June 3, Woodstock.* Fulk [Basset] Bishop of London, Walter Bishop of Worcester, John de Plessetis Earl of Warwick, John Maunsel Provost of Beverley, Henry de Bathonia, Henry Brettone, William de Grey, Imbert Pugeys, William de S. Ermine, Peter Everard. [*Roll 51. m. 4.*]

¹ The rolls were searched first by me and then by Miss Salisbury, for whose help I am grateful.

1255 *June 16, Woodstock.* Walter Bishop of Woreester, John Maunselle Provost of Béverley, Philip Luvele, John de Lexinton, Henry de Bathonia, Henry de Brettone, Drogo de Barentyn, Nicholas de Turri, William de S. Ermine, William Gernun. [*Roll 51. m. 4.*]

¹ 1256 *July 29, Gloucester.* Guy of Lusignan and Geoffrey of Lusignan our brothers, John de Plessetis Earl of Warwick, William de Clare, Robert Walerand, Henry de Brattone, Master John Maunselle, Nicholas de Turri, Walter de Mertone, Waklin de Aerderne, William de S. Ermine, Bartholomew le Bigod, William Gernun. [*Roll 56. m. 1.*]

1256 *Nov. 23, Winchester.* Aymer [de Lusignan] Bishop Eleet of Winchester and Geoffrey de Lusignan our brothers, Artald de S. Romano, William de Gray, Henry de Brattone, Master John Maunselle, Nicholas de Turri, John fitz Bernard, Aymo Trumbert, William de Trubbeville, William Gernun. [*Roll 52. m. 13.*]

1256 *Nov. 23 Winchester.* Aymer Bishop Eleet of Winchester and Geoffrey de Lusignan our brothers, Peter de Rivallibus, Artald de S. Romano, Master John Maunsel, John fitz Bernard, Henry de Brattone, William de Grey, Aymo Thurberti, William de Trubbeville, William Gernun, Wybert de Rua. [*Roll 52. m. 13.*]

1256 *Dec. 5, Clarendon.* G. de Lusignan and William de Valenee our brothers, Guy de Rochefort, William de Grey, Master John Maunsel, Henry de Brettone, Walter de Mertone, Nicholas de Turri, William de Trubbeville, William Gernun. [*Roll 52. m. 12.*]

1257 *Feb. 11, Westminster.* Richard Earl of Cornwall, Guy de Lusignan and William de Valenee our brothers, Peter of Savoy, Guy de Rochefort, Henry de Bathonia, Philip Luvel, Master John Maunsel, William de Grey, Henry de Brettone, Walter de Mertone, Nicholas de Turri. [*Roll 52. m. 8.*]

1257 *Feb. 11, Westminster.* Richard Earl of Cornwall and Guy de Lusignan our brothers, Simon de Montfort Earl of Leicester, Peter of Savoy, Guy de Rochefort, Henry de Bathonia, Philip Luvel, Master John Maunsel, William de Grey, Henry de Brettone, Walter de Mertone, Nicholas de Turri. [*Roll 52. m. 8.*]

1257 *June 1, Westminster.* William de Valenee our brother, Simon de Montfort Earl of Leicester, Richard de Clare Earl of Gloucester and Hertford, Peter of Savoy, John Maunselle Treasurer of York, Henry de Bathonia, Philip Luvel, William de Grey, Imbert Pugeys, Henry de Brattone, Master John Maunselle, Nicholas de S. Maur, William Gernun. [*Roll 52. m. 5.*]

1257 *July 15, Woodstock.* John Abbot of Peterborough, Guy de Rochefort, Henry de Bathonia, Robert Walerand, Gilbert de Prestone,

¹ The roll for 40 Henry III. is missing. The following entry is supplied from a charter recited on a later roll.

William de Grey, Imbert Pugeys, Henry de Brattone, Matthias Bezille, William de S. Ermine. [*Roll 52. m. 4.*]

1257 *July 15, Woodstock.* Abbot of Peterborough, Guy de Roehelfort, Henry de Bathonia, Robert Waleraund, Gilbert de Prestone, William de Grey, Imbert Pogeys, Henry de Brattone, Nicholas de Turri, Matthias de Bezille, William de S. Ermine, Bartholomew le Bigod. [*Roll 52. m. 4.*]

In the age of which we are speaking the justices are not among the most frequent witnesses of the royal charters; still from time to time such of them as are in the king's train will appear in the attestation clauses.¹ In the examples given above the judicial element is represented by Henry of Bath, Henry de la Mare, Nicholas de la Tour, Robert Walerand, Gilbert Preston and Henry Bratton. The ministerial or governmental element is represented by Mansel, Kilkenny, Lovel, Wengham, St. Romain and Walter of Merton. Then we see the very great people who happen to be about, and the household officers, many of whom are foreigners. Most of these men still live in the pages of Matthew Paris. It is clear that for a while Braeton 'moved in the highest circles' and had a chance of knowing 'everyone who was worth knowing'—Walter of Merton, for example, and Simon de Montfort.

If he was dismissed very shortly after the 15th of July 1257, and his dismissal was due to anything that he had said or done as a judge, we may set this to his credit. 'The misrule of Henry III' was then at its very worst. It is of this time that the Waverley monk writes as follows:—'*Leges etiam et consuetudines antiquae aut nimis corruptae, aut penitus cassatae, et ad nihilum erant redactae, et quasi pro lege erat cuique sua tyrannica voluntas, et nisi mediante pecunia de facili rectum nusquam fiebat iudicium.*'² At such a time a man who gave his reason for writing a law-book in words which tell how the '*leges et consuetudines*' of the realm '*multotiens pervertuntur a maioribus, qui potius proprio arbitrio quam legum auctoritate causas decidunt*;' ³ a man who appealed to the '*vetera iudicia*' of Pateshull and Raleigh; a man who would expend all the terrors of biblical rhetoric in denouncing the unjust judge—such a man must either have been a hypocrite or have made many enemies among the greedy favourites and shifty officials by whom the king was at this moment surrounded. However, a few stray charters might destroy all our conjectures.⁴

¹ See *Engl. Hist. Rev.* viii. 726.

² *Ann. Waverl.* p. 350.

³ Above, p. 5.

⁴ To the proofs given elsewhere (*Note Book*, vol. i. p. 21) of Braeton's session in the court held *coram rege*, add Guilding, *Records of the Borough of Reading* (1892), vol. i. p. 280—a fine levied in 1254.

APPENDIX IV.

THE DIGBY MANUSCRIPT.

A FEW years ago Professor Vinogradoff drew attention to this MS., and some account was given of it in my edition of Bracton's Note Book (vol. i. pp. 28, 99). As it still seems to me to be the most important of all the Bracton MSS. that I have seen, and as I have relied on it in the preparation of this volume, I will take this opportunity of speaking about it at some length. At present I think that it may well be a primary copy of the original MS., and that it may reproduce some external, or (if I may use the phrase) anatomical traits of its parent, a study of which will be of service hereafter when the filiation of the other MSS. is to be settled.

Let us begin by remembering that in the middle ages parchment was valuable, and men did not willingly waste it. Any one familiar with medieval books will have been struck by signs of a rigid economy. But the author of a long treatise could not always avoid all waste. He might be compelled by the stress of circumstances and the gradual evolution of his plan to make new starts from time to time, to execute now one and now another part of his project, and perhaps to write the end of his book before he wrote the beginning. When the work of composition was finished, then he had on his hands various quires or *peciae* of parchment of various sizes which were to be bound together. Blank leaves he would probably cut away, for they might be useful at a future time; but still his MS. would probably display some traces of the process which produced it. In particular we shall be likely to find the beginning of a *Liber* or *Capitulum* coinciding with the beginning of a *pecia*, while at the end of a *pecia* we shall be likely to find either some blank parchment or some evidence that leaves or parts of leaves have been excised. Then this MS. becomes the father of a family. The external features of the head of the house may for a while be reproduced in his descendants. If a copy is to be made in a hurry the exemplar will be taken to pieces and the various quires will be dealt out among two or more clerks who will set to work simultaneously. But this procedure is always leading to waste, and it is not very probable that the anatomy of the patriarchal MS. will

have much influence on the anatomy of its remote progeny. Hence we obtain two rules of presumption, namely, (1) that a MS., whose anatomy coincides with divisions of the subject matter, or, in other words, whose division into quires answers to a division into books and chapters, is a MS. which stands near in order of derivation to the original MS., and (2) that any blank leaves at the end of a quire and any signs that blank leaves have been excised tend to prove that the MS. which is in our hand is reproducing the shape of its immediate ancestor.

Now this Oxford MS. (Digby 222) seems to have been rapidly compiled in some large *scriptorium* in which many clerks were engaged. The various quires of which its exemplar consisted were handed over to various scribes. I believe that the text (even when we have excluded the *Kalendar* or Table of Contents and take no notice of the rubricators) shows the work of at least five different penmen, while at least two more were engaged in the insertion of those marginal *addiciones* of which I shall speak below. From little notes at the beginning of the quires we may infer that the book was made for a certain Sir Ralph Arundel. An inscription in chalk tells us that seven and a half *peciae* are being sent to one J. de Beaupré and that he is bound to return them. Another inscription tells us that two quires relating to the Novel Disseisin were at some time or another with one John Long. Arundel and Beaupré are the names of good Cornish families, and seem to tell us that the MS. was made in, or at all events for, that west-country in which Bracton lived and laboured. It has ample margins; these were required for the *addiciones*; but it is not in other respects a very sumptuous book, though a little red and blue paint has been expended on it. I imagine that a skilled palæographer, if he was obliged to assume that the whole book was produced at one time, would make that time the last quarter of the thirteenth century. For the more part the script is of the kind known as 'book hand'; but four quires and the marginal *addiciones* are in 'court hand.'¹

The anatomy of the MS. is as follows:—

Quire A of 8 folios. Hand 1. This contains the *Kalendar* or Table of Contents. On the first page stands a note: *Memorandum quod continentur in isto libro viginti quinque peciae et kalendar.* So the book should contain twenty-five quires besides the Table of Contents.

Quire B of 4 folios. Hand 2. Ineipit:—*In rege* (f. 1. l. 1).² The

¹ The date of a piece of handwriting should never be stated except with the utmost diffidence. One and the same *scriptorium* may contain at one and the same time an old clerk who learnt to write fifty years ago in a school that was already old fashioned, and a youth who has just imported the latest novelties. As to the number of hands employed on this MS., I cannot speak with much certainty, for of course it was impossible to lay various parts of the MS. side by side. I may have exaggerated the number.

² The numbers refer to the folios and lines of the Vulgate. The minus sign (–) before the number of a line means that the lines are counted

last page is almost blank. The end of this quire corresponds to a prominent division in the treatise. See above, p. 134.

Quire C of 8 folios. Hand 3, without marginal *addiciones*. Incipit: *Quoniam inter* (f. 11, l. 4).

Quire D of 8 folios. Hand 3, without marginal *addiciones*. Incipit: *successionem videtur* (f. 28, l. — 7).

Quire E of 8 folios. Hand 3, without marginal *addiciones*. Incipit: *ad excambium* (f. 47 b, l. — 19). At the end $1\frac{1}{2}$ pages are left blank. We pass to a new topic, that of succession.

Quire F of 8 folios. Hand 4. Incipit: *Est etiam* (f. 62 b, l. 19).

Quire G of 7 folios. Hand 4. Incipit: *homagium dedicere* (f. 82 b, l. 9). At the end $1\frac{1}{3}$ pages are left blank, and what would have been fol. 8 has been excised. We pass from the Law of Things to the Law of Actions.

Quire H of 6 folios. Hand 3 (?) without marginal *addiciones*. Incipit: *Dictum est* (f. 98 b, l. 1). At the end $1\frac{1}{2}$ pages are left blank.

Quire J of 8 folios. Hand 5.¹ Incipit: *tali quod assisam* (f. 110 b, l. 25).

Quire K of 8 folios. Hand 5. Incipit: *sine difficultate* (f. 132 b, l. 14).

Quire L of 8 folios. Hand 5. Incipit: *fuert waranto* (f. 151, l. — 18).

Quire M. of 8 folios. Hand 5. Incipit: *sine iudicio* (f. 169 b, l. — 14).

Quire N of 8 folios. Hand 5. Incipit: *utrum quid fiat* (f. 189, l. — 17).

Quire O of 4 folios. Hand 5. Incipit: *talis ante impetrationem* (f. 206 b, l. — 1). The last half-page is blank and 4 folios have been excised.

Quire P of 8 folios. Hand 6. Incipit: *Et eodem modo* (f. 214, l. — 2).

Quire Q of 9 folios. Scissors and paste have both been used. Incipit: *quod ita* [or rather *ita quod*] *sibi per* (f. 236 b, l. 4). First page written by Hand 6. This finishes the Novel Disseisin. Dorse of folio 1 left blank. Hand 7 begins a new topic at the top of folio 2 and writes the rest of the quire.

Quire R of 8 folios. Hand 6. Incipit: *premortuorum* (f. 262 b, l. 20); but the reading here is *aliorum premortuorum* [end of quire] *post mortuorum*.² Last $\frac{1}{4}$ page blank. We pass to a new topic. The sheets forming this quire are bound in a wrong order.

Quire S of 8 folios. Hand 6. Incipit: *Est* [autem] *inter alias* (f. 285 b, l. 1). The whole tract *de Actione Dotis* (ff. 296-317 b) is omitted.

upwards from the bottom of the page. I include unfinished lines, but exclude the headings of books and chapters.

¹ Hand 5 may be the same as Hand 2.

² There are dislocated MSS. to which this word (perhaps a catch word in the autograph) will, I believe, supply the key.

Quire T of 9 folios. Hand 6. Incipit: *unius deficiat* (f. 327, l. — 16). The larger part of the last page is blank and a folio is excised. We pass to a new topic.

Quire V of 8 folios. Hand 8. Incipit: *Quia diversimode* (f. 347 b, l. 23).

Quire X of 8 folios. Hand 8. Incipit: *aliquam vacare* (f. 365 b, l. — 4).

Quire Y of 8 folios. Hand 8. Incipit: *ante hereditatis* (f. 383, l. 10). A third of the last page is blank. It is possible that the next sentence (f. 399 b, § 5) is the true beginning of the treatise *De Exceptionibus*.

Quire Z of 6 folios. Hand 8, without marginal *addiciones*. Incipit: *Ad diem* (f. 399 b, l. 7).

Quire Aa originally of 12 but now of 10 folios. Hand 8, without marginal *addiciones*. Incipit: *Rex venerabili* (f. 419, l. 14). This breaks off at the end of its tenth folio with *Regis detineat* (f. 440 b, l. — 15) in the middle of a sentence. The last two folios have perished.

It will be seen that the MS. is imperfect. It wants at the end as much matter as fills about $7\frac{1}{2}$ pages (or half-folios) of the printed Vulgate text. The missing two folios would have held this matter. The Table of Contents at the beginning shows that this MS. should end where the Vulgate ends.

Another imperfection must be noticed. According to the Table of Contents, the Treatise on the Action of Dower (ff. 296–317 b) ought to occur where it occurs in the Vulgate, that is to say, between the discourse on the Assize Utrum and the discourse on the Writs of Entry. But in our MS. it does not and never did occupy that place. Also we have seen that the MS. ought to contain 25 quires besides the Kalendare; also that it now contains only 23. We may perhaps infer that in this MS., as in some other MSS., the treatise on the Action of Dower had found its place at the very end of the book. In the Vulgate text it fills somewhat less than 22 folios. This amount of matter would take up a little more than a normal quire (8 folios) of the MS. Further, the remark about J. de Beaupré to which I have already referred, though it is curiously enigmatical, tells us that the writer of it knew the discourse on the Action of Dower, and seems to tell us that this discourse was included either in our manuscript or in its exemplar.¹

¹ Lay the MS. open at the middle of Quire S. On your left you have the dorse of f. 130, on your right the front of f. 131. In the bottom margin of f. 130 b (or rather partly on the dorse of f. 129 and partly on that of f. 130, which has lost its left-hand corner) there is this legend:— 'Mittuntur J. de Bello Prato septem pecie et dimidia subsequentes rubricam istam, videlicet, quod non est capienda convictio super convictionem. Et de illis tenetur respondere domino [R.] de Arundelle. Sequitur continuatio multociens per recorda bene sequitur convictio convictionem et durat titulus usque ad titulum de accione dotis et qualiter dos constituatur.' This occurs (see Vulgate, f. 295 b) at the bottom of a page, the last part of which is governed by the rubric *Quod non est capienda convictio super con-*

And now turning back we see that in nine cases (namely at the end of Quires B, E, G, H, O, R, T, Y, and after the first folio of the irregular Quire Q) we have valuable traces of the anatomy of the MS. which lay before the copyists as their model. Further, in seven of these cases the anatomical line coincides with a transition from topic to topic, and thus we are brought near to the autograph.

But the reproduction by this MS. of the features of its parent does not stop here. In some respects more important than those yet noticed, the copyists seem to have endeavoured to produce a facsimile of their model. On f. 69 of the Vulgate text Bracton says that he is going to give what in effect would be a writ of 'formedon in the remainder': *breve autem tale erit*, he says, but he gives no writ, and it is a controverted question whether in his day such a writ had become current. Now in our MS. these words are followed by a blank space, no less than five-and-twenty lines being left vacant. This waste of material can hardly be explained except by the supposition that in Bracton's own MS. a space was left at this point by the author, a space which he hoped to be able to fill up at some future time. So here again we seem to be approaching the autograph.

However, the most interesting and distinctive trait of the Digby codex consists of the large mass of matter which stands in its margins at the sides and the bottoms of the pages. I have made the following rough list of the passages contained in the Vulgate text which are to be found in this border-land, for such a list may be useful to those who are examining other MSS. The first and last words of the passages will be given, and an asterisk will be set against those passages which I have seen marked as *addiciones* in other MSS.

* f. 3, l. 11 quia est ius . . . l. — 14 ius maius. (See above, p. 25.)

This is the *Addicio Prima* of some MSS.

f. 7, l. 20 sed si extra . . . l. 23 imprisonment. (See above, p. 81.)

f. 65 b, l. 1 Et ad hoc . . . l. 3 retinuit. Citation from 4-5 Hen. III.

f. 65 b, l. 19 Possunt quidem . . . l. 24 successionis.

f. 67, l. 2 Et notandum . . . l. 14 donationis.

f. 68, l. — 13 Sed re vera . . . l. — 10 expectaret.

f. 76 b, l. 14 Si autem non sit . . . l. 18 messuagiis.

f. 82 b, l. — 12 Et quid si . . . l. — 8 capitalibus.

f. 83 b, l. — 19 Et poterit . . . l. — 10 procedendum erit.

f. 86 b, l. — 10 Sed si ita . . . l. — 4 dnodecimo.

f. 88 b, l. 19 Casus Henrici de Tracy . . . l. 22 feodo. (See Note Book, vol. i. p. 39, note 3.)

victionem. The next page begins with *multociens per recorda bene sequitur convictio convictionem*. Then after a few lines, we are at the end of the Assize Utrum. Here in the Vulgate comes the Action of Dower, so that in the Vulgate it is true that the rubric (titulus) *Quod non est capienda*, etc. endures (durat) until the rubric *De actione dotis* begins. But, as a matter of fact, in our MS. we get the Writ of Entry instead of the Action of Dower. I am at a loss for a hypothesis that would exactly explain this inscription.

- f. 92, l. — 6 Et dotis species . . . f. 92 b, l. 17 quibuscunque. A long passage with romanesque phrases.
- f. 95 b, l. 3 Sed sine praeiudicio . . . l. 11 simul stat.
- f. 96, l. 16 Item quis . . . l. 24 causa.
- f. 113, l. 2 Item incidit . . . l. 14 restitutione. (See above, p. 208. Romanesque.)
- f. 114, l. 17 Et notandum . . . l. — 1 ut in Iustic. [*corr.* Instit.] (See above, p. 209. Learned Romanism.)
- f. 114, l. — 1 Item notandum . . . f. 114 b, l. 11 capax sit. (See above, p. 213. Citations of Digest, Code and Decretum.)
- f. 115 b, l. — 5 Ad quod notari . . . f. 116, l. 1 la bane.
- f. 122, l. 14 Item batelli . . . l. 20 mari.
- f. 124 b, l. 15 sicut in com. Hereford . . . l. 18 quinto. Citation from 5 Hen. III.
- f. 127 b, l. — 22 Facta autem . . . l. — 6 humana.
- f. 130, l. 7 Et notandum . . . l. 10 heredes suos.
- f. 130 b, l. 5 ut quibusdam videtur . . . l. 11 et bona. Citation of an opinion of William of York.
- f. 132 b, l. 21 Cum appellatus . . . l. 30 aliud fiat.
- f. 133, l. 2 Quid felo . . . f. 133 b, l. 9 rite factam. Very long; more than a page of the Vulgate.
- f. 135, l. 22 nec deodanda . . . l. 25 docere poterit.
- f. 136 b, l. 13 et voluntas . . . l. 14 furandi.
- f. 141, l. 14 sicut fuit de Ricardo Noel et Radulfo de Bray, Vitali Engaingne et Willelmo filio Helie.
- f. 142 b, l. 6 Item si cum . . . l. 16 Godingeham. Citation from 9 Hen. III.
- f. 142 b, l. — 7 ut de itinere . . . l. — 5 etatem. Citation from 10 Hen. III.
- f. 144 b, l. 21 sicut coram rege . . . l. 23 mortem. Citation of a case before Raleigh.
- f. 147, l. — 9 Raptus mulieris . . . f. 147 b, l. — 5 habetur. The long romantic story of a rape.
- f. 150, l. — 20 Qui autem se submerserint . . . l. — 17 deberet.
- f. 150, l. — 11 quia convincitur . . . l. — 10 proposuit.
- f. 150 b, l. 1 De submersis . . . l. 2 supra.
- f. 152, l. 8 Et qui sic convieti . . . l. 12 iudicatus.
- f. 155 b, l. — 3 Et eodem . . . f. 156, l. 5 extiterit.
- f. 159, l. 13 Casus de Petro de Sabandia . . . l. 15 ascensionem. Citation from 46 Hen. III. See *Note Book*, vol. i. p. 38, note 7.
- f. 161 b, l. 6 Et quae poena . . . l. 14 de iure.
- f. 161 b, l. — 14 contendendo . . . l. — 12 tenemento.
- f. 161 b, l. — 6 Item facit . . . f. 162, l. 13 tale breve.
- f. 163, l. 7 Incontinenti . . . l. 9 divertat.
- f. 165, l. — 3 Et cum neuter . . . f. 165 b, l. 3 possidendi (*corr.* possessionis).
- f. 168, l. 22 nec puris villanis . . . l. 24 socagio.

- f. 168, l. — 1 Item idem . . . f. 168 b, l. 3 exeuntibus.
 f. 168 b, l. 10 Et competit . . . l. 14 servitute viri.
 f. 169, l. — 20 dum tamen . . . l. — 18 ut alibi.
 f. 169, l. — 18 Si autem tenens . . . l. — 2 solverit.
 f. 170, l. 15 dum tamen per breve in suo casu.
 f. 170, l. — 2 Et illud idem . . . f. 170 b, l. 5 tenementum suum.
 f. 171 b, l. — 2 Si autem ballivus . . . f. 172, l. 1 regis.
 f. 175 b, l. — 10 si praesens . . . l. — 8 excambium.
 f. 176, l. 4 non subvenitur . . . l. 8 ad disseisitum.
 f. 176 b, l. 10 Item transfertur . . . l. — 12 annum et unum.
 f. 179 b, l. — 6 [videlicet] utrum terra . . . l. — 4 ut infra.
 f. 179 b, l. — 4 quia si querens . . . f. 180, l. 20 dicitur pertinere.
 Citation from 5 Hen. III.
 f. 181, l. — 21 Sed hoc locum . . . l. — 19 nolit.
 f. 181, l. — 19 Melius tamen . . . l. — 14 satisfactum.
 f. 182, l. — 2 Si autem nulla . . . f. 182 b, l. 2 plegii.
 f. 183 b, l. — 19 [Judicem omnia rimari oportet.] imprimis de quo tenementum . . . l. — 3 et V. Q. V. C. I. (Digby ij. Q. v. C. j.) The true citation would seem to be Causa vi. Quaestio v. c. 1.
 f. 184, l. 3 Quia qualitercunque . . . l. 8 de codem.
 f. 184 b, l. — 15 Item si dicat . . . l. — 12 conventionem.
 f. 186 b, l. — 17 quia quamvis quis . . . l. — 12 assisae.
 f. 187 b, l. 20 secundum hoc oportet . . . l. 21 et aequi.
 f. 188 b, l. — 13 Item si quis . . . l. — 10 ministerio.
 f. 190 b, l. — 15 In restitutione . . . l. — 10 ante fugam.
 f. 191 b, l. — 17 competit tamen . . . l. — 15 actionem.
 f. 191 b, l. — 15 Item esto . . . l. — 1 disseisina.
 f. 192, l. — 8 sive liber tenuerit . . . l. — 5 potestatem.
 f. 192 b, l. 4 Et ad probandam . . . l. 8 domini.
 f. 194 b, l. 3 'Thomas de Veteri Ponte et Ricardus de Langeford.'
 f. 195, l. — 19 Si autem contra . . . l. — 1 sed contra. Citation of cases from 20-1-3 Hen. III.
 f. 195 b, l. 10 Habere poterit . . . l. 13 alibi plenius.
 f. 195 b, l. 13 Sed tamen iuste . . . l. 14 non habet.
 f. 196, l. 5 Et cum verus . . . l. 10 persona domini.
 f. 197, l. 9 de libertate licet . . . l. 27 ante assisam.
 f. 198, l. 11 nec praeiudicabitur . . . l. 24 consensu partium.
 f. 201, l. 10 Cum autem . . . l. 26 superflua.
 f. 202 b, l. — 18 Idem erit . . . l. — 16 hoc casu.
 f. 202 b, l. — 16 Eadem forma . . . l. — 9 acquirendis.
 f. 203, l. — 6 Cum tenens . . . f. 203 b, l. 3 discutiendum.
 f. 206, l. 4 et multo fortius . . . l. 6 eiectus.
 f. 212, l. — 14 Et quid si dicatur . . . l. — 7 capite [et dominio] uno.
 f. 212 b. Insert at l. — 4 'Item contra iuratores et causam suspicionis pretendere.'
 f. 213 b, l. — 8 Et sive satisfactum . . . l. — 4 ut infra.
 f. 218 b, l. — 21 In omni casu . . . f. 219, l. 1 vel praeter.

- * f. 219, l. 1 Et esto quod . . . l. — 22 et iure.
- f. 219 b, l. — 26 Item si quis . . . l. — 22 de ingressu.
- f. 220, l. — 12 vel sic si talis . . . l. — 3 firmarium elecit.
- f. 221, l. 4 quia si fuerit . . . l. 8 pertinere possit.
- f. 221, l. 19 quia si violentia . . . l. 28 in commodato.
- f. 221 b, l. 15 Hoc quod . . . l. 16 iniuste levatis.
- f. 221 b, l. — 12 Et in omnibus . . . l. — 7 esset constituta.
- f. 225, l. 6 Poterit quis . . . l. 10 per assisam.
- f. 226, l. 18 Item competit . . . l. 26 ex praesumptione.
- f. 226 b, l. 21 Cum iura . . . f. 227, l. 12 ut supra. Nearly a page of the Vulgate.
- f. 228 b, l. — 4 Item dici . . . l. — 1 vel alibi.
- f. 230 b, l. 23 Item se ponere . . . l. 27 vel e contra.
- * f. 233, l. 17 Item si quis . . . l. — 6 sed mensuris.
- circ. f. 234 Iniuste si nocumentum iniuriosum et damnosum . . . preferenda est private. Apparently not in the Vulgate.
- f. 236, l. — 17 Si tamen [*corr.* Sed cum] talis actio . . . l. — 13 reparare etc.
- circ. f. 239 Per hoc autem quod dicitur deforciat videtur . . . vel commode. Apparently not in the Vulgate.
- f. 242, l. — 8 Per hoc autem . . . l. — 3 in principio. Variation from Vulgate.
- circ. f. 254 Sed cum plures se faciant heredes . . . aliud esset. Apparently not in the Vulgate.
- f. 258 b, l. 4 Et quod assisa . . . l. 9 multis locis. Citation from 3-4 Hen. III.
- f. 265, l. — 17 Item primus . . . l. — 14 continentur.
- f. 267, l. — 13 quia si talis . . . l. — 11 heredem.
- f. 269 b, l. 24 Et ideo . . . f. 270, l. 2 de warantia.
- f. 270, l. — 9 Item dicere . . . l. — 8 vivus est.
- f. 270 b, l. 1 Item si quis . . . l. 6 proprietatis.
- f. 271, l. — 17 secundum quod . . . l. — 12 ut supra. Allegation of a Cornish custom.
- f. 272 b, l. 4 Sed si probari . . . l. 15 ius merum.
- f. 273 b, l. — 9 Sed contra . . . l. — 5 de nativis.
- f. 274 b, l. 8 Sed contra . . . l. 10 a minore.
- f. 274 b, l. 10 Sed cum ante . . . l. 15 huiusmodi.
- f. 275, l. 16 Item si capitalis . . . l. 32 disseisiti.
- f. 275 b, l. — 11 Sed qualiter . . . l. — 1 Teste etc.
- f. 276 b, l. — 11 praedictus . . . l. — 8 communis. But read: Praedictus Henricus habuit filium Willelmum nomine qui forisfecit terram, et unde fuit in seisina, quia falsavit sigillum domini Regis, et sorores tulerunt assisam de morte patris communis.
- f. 277, l. 9 Et notandum . . . l. 32 aufertur.
- f. 277 b, l. 8 ut de itinere . . . l. 9 Radulphi. Citation from 3 Hen. III.
- f. 277 b, l. 23 Sed contrarium . . . l. 27 minoris. Citation from 42 (not 13) Hen. III.

- * f. 278 b, l. 25 Item sicut non . . . f. 279 b, l. — 17 propinquiores. Two pages of the Vulgate.
- f. 280, l. 5 Idem dici . . . l. 8 ventris.
- f. 282, l. 3 Sine praeiudicio . . . l. 32 seisinam habuerit.
- f. 282, l. 32 Cum frater . . . f. 282 b, l. 25 recenti seisina. Two *addiciones* fill a page and a half of the Vulgate.
- f. 283 b, l. 10 quia si quis in causa . . . l. 12 ius merum.
- f. 285 b, l. 6 inter eos inter quos . . . l. 11 ponetur casus.
- f. 287 b, l. — 12 Si autem . . . l. — 1 fecerit etc.
- f. 290, l. 12 Sed admitti . . . l. 19 opus esset.
- f. 291 b, l. — 22 Et excipi . . . l. — 17 parte aliqua.
- f. 292, l. — 4 Si forte . . . l. — 1 Somerset.
- f. 296, l. 10 Contingit . . . l. 25 convictionem.
- f. 319, l. 27 Item de hac . . . l. 29 tenente. Citation from 4 Hen. III.
- f. 320, l. 12 secundum quod . . . l. 14 Murdac. Citation from 3 Hen. III.
- f. 320 b, l. — 18 Sed re vera . . . l. — 13 rotulo de termino. No term mentioned.
- f. 321 b, l. — 11 Et notandum . . . f. 322, l. 4 comitatu Ebor.
- f. 322, l. — 1 Re vera licet . . . f. 322 b, l. — 7 mortem matris.
- * f. 334, l. — 16 Sunt autem . . . l. — 4 summonitionem.
- f. 335 b, l. 14 si petens se . . . l. 18 de termino.
- f. 336, l. 12 De hac materia . . . l. 14 querente. Citation from 3-4 Hen. III.
- f. 338, l. 13 Habent etiam . . . f. 339, l. 3 damnosa. Two pages of the Vulgate.
- f. 341, l. — 6 Item non iacet . . . f. 341 b, l. 1 controversia.
- f. 346 b, l. 13 Et oportet . . . l. 17 malo lecti.
- f. 350, l. 8 Sed contra . . . l. 19 fine facto. Citation from 6 Hen. III.
- f. 350 l. — 12 Item non iacet . . . f. 350 b, l. 17 de North'.
- f. 350 b, l. 17 Item in eodem non iacet . . . l. 32 mortis antecessoris.
- A great part of the minute learning about essoins is in the margin.
- * f. 355, l. — 3 Et quod licentia . . . f. 355 b, l. 6 multis locis. Citation from 14 Hen. III.
- f. 357, l. 11 Sed sive infirmitas . . . l. 16 nisi velit.
- * f. 357, l. 23 vel si forte . . . l. 29 in hoc casu. Citation of an answer given by Raleigh and Segrave to Duckett.
- f. 357 b, l. 23 licet ab initio fuerit divisa . . . l. 24 inter coheredes.
- circ. 370 b. Sed quid si vir primo fecerit defaultam et uxor . . . sine defensione per legem. Apparently not in the Vulgate.
- f. 373, l. 17 Et de tenera . . . l. 22 recuperatione.
- f. 373 b, l. — 7 Sed caute . . . l. — 5 infra eodem.
- f. 375, l. 25 Et de hac . . . l. 27 Wellensis. Citation from 14 Hen. III.
- f. 375 b, l. 19 quia descensus iuris . . . l. 22 acquiritur.
- * f. 375 b, l. — 16 Sed naturaliter . . . l. — 2 dominorum. Citation from 7 Hen. III.
- f. 376 b, l. 12 Sed re vera . . . l. 17 visu faciendo.

- * f. 377, l. 3 Item denegatur . . . l. 5 de eodem.
 f. 381, l. 15 nisi ita sit . . . l. 16 dominetur.
 f. 382, l. — 9, ut probatur . . . l. — 7 obligatum.
 f. 390 b, l. 6 Si autem . . . l. 10 esse heredem. But the Vulgate omits part of the sentence.

Now as to the character of these marginalia, of which I have here noted more than 150, anyone who examines them will soon be convinced that, at all events for the more part, they do not consist of mere corrections of an ill-copied text. Those who have seen medieval MSS. will be familiar with the marginal work of the corrector who compares the copy with its model and supplies the omissions that are due to the clerk's negligence. But we have not here to do with work of that kind. Of such mere corrections I have taken no note. When a clerk stupidly omits a passage, that passage will, in the majority of cases, be no perfect sentence, and his blunder will generally be occasioned by the recurrence of a single word, which will begin and end the omitted passage. Our marginalia, on the other hand, are perfect sentences.

Again, our marginalia ought not to be called 'glosses,' for they are not endeavours to explain a text which is considered to need explanation. The best name that we can give to them is the name that is noted against a few of them in some of the MSS. in which they have been taken up into the text:—they are *addiciones*, additions to the text. If we suppose that they proceed from Bracton, we may believe his intention to have been that they should be taken up into the text. His complaint against his copyists and editors would be, not that these *addiciones* have been assumed into the body of his work, but that they have too often been inserted at inappropriate places. Had they been 'glosses' many of them would have remained in the margin, for the medieval copyist knew well how to transcribe a glossed text; but just because they are not glosses but *addiciones*, it is a piece of strange good fortune that one MS. still keeps them in the margin.

That in general they come from Bracton himself, I can hardly doubt. The cases cited in them are found on just those rolls that Bracton used. Some of those cases come from the earliest rolls of Henry III.'s reign. Again, we have references to Roman and Canon law; indeed, as has been said above (pp. xvi, 208–214) the most erudite passages in the whole treatise are *addiciones*. On the other hand we may see a profound interest in the details of practice. Much of what is said about essoins stands in the margin. If the annotator was not Bracton, he had just Bracton's interests and just Bracton's style.

I must add, however, that even the Digby MS., faithful though it may be, has received into its text at least one passage which must have once stood in the margin. The case is an extremely clear one. On f. 220 b the Vulgate gives a passage in which what is obviously a romanesque *addicio* derived from Paulus has forced its way into the

middle of a sentence and made nonsense. In this case the Digby MS. agrees in substance with the printed book.¹ Useful, therefore, though that MS. will be when the treatise is to be edited, we cannot accept it as a perfect copy of the autograph, and indeed in small matters it not unfrequently gives a worse text than may be found elsewhere.

Again, as we have lately seen, this MS. omits the part of the treatise that is devoted to the Action of Dower. What is more, it contains six quires (C, D, E, H, Z, Aa) which have no *addiciones*. Four of these quires (C, D, E, H) were written by a curial hand in a style very different from that in which the other quires were written. How it came about that the *addiciones* were not supplied here, I cannot say, but other MSS. seem to prove that such *addiciones* existed. A few of the longer of these are marked as *addiciones* in other MSS. At Eton College too, there is a MS. in which a few of these *addiciones* have been inserted on small slips of parchment which are bound in among the folios of the volume.² The following is a list of a few prominent *addiciones* which occur in that part of the text which is covered by Quires C, D, E of the Digby MS.

Addicio tertia. Vulgate f. 13 b, l. — 19 Et sciendum . . . f. 14, l. 3 ad verum dominum. On a slip in the Eton MS.

Addicio secunda. Vulgate f. 14 b, l. 7 Et notandum . . . l. 19 alius substitui. On a slip in the Eton MS.

Addicio quarta. Vulgate f. 17 b, l. — 4 Notandum quod bene . . . f. 18, l. 23 quod non possit. On a slip in the Eton MS.

Addicio quinta. Vulgate f. 21 b, l. 7 Item poterit . . . l. 27 quam nullum. On a slip in the Eton MS.

Addicio sexta. Vulgate f. 23 b, l. — 20 quia sicut . . . l. — 2 scilicet decem. On a slip in the Eton MS.

Vulgate f. 29, l. — 7 Contrarium . . . l. — 4 Godfridi. On a slip in the Eton MS. See Note Book, vol. i. p. 39, note 2.

Vulgate f. 34 l. — 14 Item nec factum . . . f. 34 b, l. 1 stridor dentium. This *Addicio de cartis* is the famous passage touching the king and his court. See Note Book, vol. i. p. 29.

Vulgate f. 49 b. l. 15 Item si in carta . . . l. — 6 nihil acquirit. See Note Book, vol. i. p. 39, note 3.

As regards Quire H, the greater part of what is contained in this section of the Digby MS. has been printed above (pp. 134-198). A good many short phrases are altogether absent from this MS., but are found in other MSS.; these have been enclosed within brackets in the text that we have given; they seem to be *addiciones*. Finally, as

¹ 'Poterit enim quilibet eorum sine praeiudicio alterius [quia recte dicimus . . . alterius esse] in seisinâ esse eiusdem tenementi.' A romanesque note divides the *Poterit quilibet* from the *in seisinâ esse*.

² In other respects this MS. does not stand very high. It belongs to the large class (Note Book, vol. i. p. 27) in which the Statute of Westminster has left its trace upon the writ of Mort d'ancestor. I have to thank the Vice-Provost of Eton for very kindly facilitating my use of this MS.

already said, the last two quires (Z, Aa) afford us no *addiciones*. I have as yet made no careful comparison between this part of the MS. and the Vulgate, but elsewhere I have seen marked as an *addicio* the passage f. 414, l. — 20 *Et si unus . . . l. 12 filio Godfrey*; and I believe that there are a few other *addiciones* in this part of the treatise. On f. 417 the Digby MS. omits the list of the magnates who were present at the making of the ordinance about bastardy.

The time is, I hope, not very far distant when the Selden Society will be able to put in hand an edition of Bracton. The editor's work will be long and should not be undertaken in haste. At present it seems to me highly desirable that the suggestions about the history of the *addiciones* which have been made of late years should be carefully tested by more than one head before any decisive step is taken. Of course it may turn out that there are better MSS. than the Digby in existence. It is possible, for one thing, that the autograph is still among us. It is possible, for another thing, that Bracton suffered the autograph to be copied before he inserted the *addiciones*, and that thus we may come upon what might be called a copy of the 'first edition' of the treatise. I can say no more than that the Digby MS. seems to me to have no peer in the British Museum, the Bodleian, the University Library at Cambridge, Trinity College at Cambridge, Eton College, Lincoln's Inn, Gray's Inn, or the Philipps Library at Cheltenham, and that unless another MS. with many marginalia can be found, or a MS. from which the *addiciones* are utterly absent (and which therefore might pass for a copy of a 'first edition'), the future editor will, so it seems to me, have to make the Digby MS. the foundation-stone of his work. He will also have to consider the policy to be pursued in the matter of the romanesque passages. Will he endeavour to restore by conjectural emendations what ought to have been Bracton's meaning if Bracton understood Azo and the Institutes? It is not for me to dictate or even to prophesy his course; but I have ventured to suggest in the Introduction to this book that Bracton's knowledge of Roman law was by no means profound, and my object will have been gained if even by the statement of one-sided and ignorant opinions I have prepared the way for a good piece of work that will do honour to the Society.

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* For further information on these Records, see the valuable and learned "Guide to the Principal Classes of Documents preserved in the Public Record Office," by S. R. SCARGILL-BIRD, F.S.A. (London, Eyre & Spottiswoode, 1891.)

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Vol. . CONVEYANCING PRECEDENTS of the THIRTEENTH CENTURY.

There are several interesting sets hitherto unprinted. The mercantile transactions are very curious.

Vol. . BREVIA PLACITATA, a book of precedents for pleading in the King's Courts, Thirteenth Century.

Vols. . The HISTORY of the REGISTER of ORIGINAL WRITS :

The reign of Henry III.
The reign of Edward I.
The reign of Edward III.
The Fifteenth Century.

* For further information on these Records, see the valuable and learned "Guide to the Principal Classes of Documents preserved in the Public Record Office," by S. R. SCARGILL-BIRD, F.S.A. (London, Eyre & Spottiswoode, 1891.)

The Society has also contemplated the collection of materials for an ANGLO-FRENCH DICTIONARY, for which practical instructions have been kindly drawn up by Professor Skeat. The Council will be glad to receive offers of help in this collection with a view to future publication.

The Council will be grateful for any information upon the contents and custody of any MSS. which may be of sufficient interest to be dealt with by the Society.

September 1895.

Selden Society.

FOUNDED 1887.

R U L E S.

1. The Society shall be called the Selden Society.
2. The object of the Society shall be to encourage the study and advance the knowledge of the history of English Law, especially by the publication of original documents and the reprinting or editing of works of sufficient rarity or importance.
3. Membership of the Society shall be constituted by payment of the annual subscription, or in the case of life members, of the composition. Form of application is given at the foot.
4. The annual subscription shall be £1. 1s., payable in advance on or before the 1st of January in every year. A composition of £21 shall constitute life membership from the date of the composition, and in the case of Libraries, Societies, and corporate bodies, membership for 30 years.
5. The management of the affairs and funds of the Society shall be vested in a President, two Vice-Presidents, and a Council consisting of fifteen members, in addition to the *ex officio* members. The President, the two Vice-Presidents, the Literary Director, the Secretary, and the Hon. Treasurer shall be *ex officio* members. Three shall form a quorum.
6. Until the Annual General Meeting in the year 1896 the following shall be the fifteen members of the Council:—The Hon. Mr. Justice Bruce, Mr. A. M. Channell, Q.C., Sir Howard W. Elphinstone, Bart., Mr. M. Ingle Joyce, Mr. B. G. Lake, Mr. H. C. Maxwell Lyte, Mr. A. Stuart Moore, Mr. R. Pennington, Sir F. Pollock, Bart., Mr. W. C. Renshaw, Q.C., Mr. S. R. Seargill-Bird, The Hon. Mr. Justice Stirling, Mr. J. Westlake, Q.C., His Honour Judge Meadows White, the Hon. Mr. Justice Wills, five of whom (in alphabetical order) shall retire at the Annual General Meeting in the year 1896, five (in the like order) in the year 1897, and the remaining five in the year 1898. At each subsequent Annual General Meeting the five members who have served longest without re-election shall retire. A retiring member shall be re-eligible.
7. The five vacancies in the Council shall be filled up at the Annual General Meeting in and after the year 1896 in the following manner: (a) Any two Members of the Society may nominate for election any other member by a writing signed by them and the nominated member, and sent

to the Hon. Secretary on or before the 14th of February. (b) Not less than fourteen days before the Annual General Meeting the Council shall nominate for election five members of the Society. (c) No person shall be eligible for election on the Council unless nominated under this Rule. (d) Any candidate may withdraw. (e) The names of the persons nominated shall be printed in the notice convening the Annual General Meeting. (f) If the persons nominated, and whose nomination shall not have been withdrawn, are not more than five, they shall at the Annual General Meeting be declared to have been elected. (g) If the persons nominated, and whose nomination shall not have been withdrawn, shall be more than five, an election shall take place by ballot as follows : every member of the Society present at the Meeting shall be entitled to vote by writing the names of not more than five of the candidates on a piece of paper and delivering it to the Hon. Secretary or his Deputy, at such meeting, and the five candidates who shall have a majority of votes shall be declared elected. In case of equality the Chairman of the Meeting shall have a second or casting vote.

8. The Council may fill casual vacancies happening in their number. Persons so appointed shall hold office so long as those in whose place they shall be appointed would have held office. The Council shall also have power to appoint Honorary Members of the Society.

9. The Council shall meet at least twice a year, and not less than seven days' notice of any meeting shall be sent by post to every member of the Council.

10. There shall be a Literary Director to be appointed and removable by the Council. The Council may make any arrangement for remunerating the Literary Director which they may think reasonable.

11. It shall be the duty of the Literary Director (but always subject to the control of the Council) to supervise the editing of the publications of the Society, to suggest suitable editors, and generally to advise the Council with respect to carrying the objects of the Society into effect.

12. Each member shall be entitled to one copy of every work published by the Society as for any year of his membership. No person other than an Honorary Member shall receive any such work until his subscription for the year as for which the same shall be published shall have been paid.

13. The Council shall appoint an Hon. Secretary and also an Hon. Treasurer and such other Officers as they from time to time think fit, and shall from time to time define their respective duties.

14. The funds of the Society, including the vouchers or securities for any investments, shall be kept at a Bank, to be selected by the Council, to an account in the name of the Society. Such funds or investments shall only be dealt with by a cheque or other authority signed by the Treasurer and countersigned by one of the Vice-Presidents or such other person as the Council may from time to time appoint.

15. The accounts of the receipts and expenditure of the Society up to the 31st of December in each year shall be audited once a year by two Auditors, to be appointed by the Society, and the report of the Auditors, with an abstract of the accounts, shall be circulated together with the notice convening the Annual Meeting.

16. An Annual General Meeting of the Society shall be held in March 1896, and thereafter in the month of March in each year. The Council may upon their own resolution and shall on the request in writing of not less than ten members call a Special General Meeting. Seven days' notice at least, specifying the object of the meeting and the time and place at which it is to be held, shall be posted to every member resident in the United Kingdom at his last known address. No member shall vote at any General Meeting whose subscription is in arrear.

17. The Hon. Secretary shall keep a Minute Book wherein shall be entered a record of the transactions, as well at Meetings of the Council as at General Meetings of the Society.

18. These rules may upon proper notice be repealed, added to, or modified from time to time at any meeting of the Society. But such repeal, addition, or modification, if not unanimously agreed to, shall require the vote of not less than two-thirds of the members present and voting at such meeting.

March 1895.

FORM OF APPLICATION FOR MEMBERSHIP.

To Mr. FRANCIS K. MUNTON, 95A Queen Victoria Street, London, E.C.,
Honorary Treasurer of the Selden Society.

I desire to become a member of the Society, and herewith send my cheque for One Guinea, the annual subscription [or £21 the life contribution] dating from the commencement of the present year. [I also desire to subscribe for the preceding years , and I add one guinea for each to my cheque.]

Name

Address

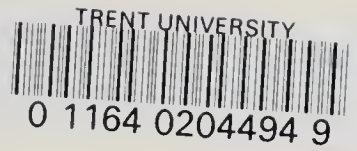
Description

Date

[NOTE.—Cheques, crossed "ROBARTS & Co., a/c of the Selden Society," should be made payable to the Honorary Treasurer, from whom forms of bankers' orders for payment of subscriptions direct to the Society's banking account can be obtained.]

Date Due

JAN 9 1973		NOV 05 2002	
JAN 14 1978			
NOV 11 2002			
FEB 13 2005			
MAR 07 2006			



KD456 .S4 v. 8 1894
Selden Society, London
Publications

DATE	ISSUED TO 189331
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189331

